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MICHIGAN REPORTS

CASES DECIDED

IN THE

SUPREME COURT

OF

MICHIGAN

FROM

MARCH 30 TO JUNE 5, 1922

RICHARD W. COOPER
STATE REPORTER

VOL. 218

FIRST EDITION

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1922

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Chief Justice.

	Term expires
GRANT FELLOWS, Hudson, ...	Dec. 31, 1923

Associate Justices.

HOWARD WIEST, Lansing, ...	Dec. 31, 1923
JOHN S. McDONALD, Grand Rapids, . .	Dec. 31, 1925
GEORGE M. CLARK, Bad Axe, ...	Dec. 31, 1925
JOHN E. BIRD, Adrian, ...	Dec. 31, 1927
NELSON SHARPE, West Branch, . . .	Dec. 31, 1927
JOSEPH B. MOORE, Lapeer, ...	Dec. 31, 1929
JOSEPH H. STEERE, Sault Ste. Marie, . .	Dec. 31, 1929

Clerk—JAY MERTZ, Lansing.

Crier—ANDREW B. CHAPIN, Lansing.

Attorney General—MERLIN WILEY, Sault Ste. Marie.

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1.	GUY M. CHESTER,	HILLSDALE.
2.	CHARLES E. WHITE,	NILES.
3.	JOHN H. GOFF, THEODORE J. RICHTER, HENRY M. MANDELL, JOSEPH A. MOYNIHAN, CLYDE I. WEBSTER, HARRY J. DINGEMAN, A. F. MARSCHNER, IRA W. JAYNE, ORMOND F. HUNT, ARTHUR WEBSTER,	DETROIT.
4.	JAMES A. PARKINSON, BENJAMIN WILLIAMS,	JACKSON.
5.	CLEMENT SMITH,	HASTINGS.
6.	GLENN C. GILLESPIE, FRANK L. COVERT,	PONTIAC.
7.	EDWARD D. BLACK, FRED W. BRENNAN,	FLINT.
8.	FRANK D. M. DAVIS,	IONIA.
9.	GEORGE V. WEIMER,	KALAMAZOO.
10.	ERNEST A. SNOW, CLARENCE M. BROWNE,	SAGINAW.
11.	LOUIS H. FEAD,	NEWBERRY.
12.	JOHN G. STONE,[1]	HOUGHTON.
13.	FREDERICK W. MAYNE,	CHARLEVOIX.
14.	JOHN VANDERWERP,	MUSKEGON.
15.	CLAYTON C. JOHNSON,	COLDWATER.
16.	JAMES G. TUCKER,	MT. CLEMENS.
17.	WILLIS B. PERKINS, MAJOR L. DUNHAM, WILLIAM B. BROWN,	GRAND RAPIDS.
18.	SAMUEL G. HOUGHTON,	BAY CITY.
19.	HAL. L. CUTLER,	LUTHER.
20.	ORIEN S. CROSS,	ALLEGAN.
21.	RAY HART,	MIDLAND.
22.	GEORGE W. SAMPLE,	ANN ARBOR.

[1]Appointed to succeed Patrick H. O'Brien, resigned.

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24.	WATSON BEACH, ...	LEXINGTON.
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27.	JOSEPH BARTON, ...	BIG RAPIDS.
28.	FRED S. LAMB, ...	CADILLAC.
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	CHARLES B. COLLINGWOOD, .	EAST LANSING.
31.	EUGENE F. LAW, ...	PORT HURON.
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33.	FRANK SHEPHERD, ...	CHEBOYGAN.
34.	GUY E. SMITH, ...	GLADWIN.
35.	JOSEPH H. COLLINS, . . .	CORUNNA.
36.	L. BURGET DES VOIGNES, . .	CASSOPOLIS.
37.	WALTER H. NORTH, . . .	BATTLE CREEK.
38.	JESSE H. ROOT, ...	MONROE.
39.	BURTON L. HART, ...	ADRIAN.
40.	WILLIAM B. WILLIAMS, . .	LAPEER.

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EDWARD J. JEFFRIES, THOMAS M. COTTER,
JOHN FAUST, WILLIAM M. HESTON,
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JANUARY TERM, 1922.*

PEOPLE *v.* O'KEEFE.

1. CRIMINAL LAW — DISTURBING THE PEACE — EVIDENCE — SUFFICIENCY.

   In a prosecution under 3 Comp. Laws 1915, § 15483, for disturbing the peace, where the evidence failed to show any "disturbance or contention," defendant's motion for a directed verdict of "not guilty" should have been granted.

2. SAME—TRIAL—ARGUMENT OF COUNSEL—INFERENCES.

   While, in a criminal prosecution, the prosecutor, in his argument to the jury, has the right to draw all reasonable inferences from the proofs submitted which tend to show guilt of the offense charged, he has no right to infer or challenge the attention of the jury to the fact that defendant was committing a crime with which he was not charged.

Error to recorder's court of Detroit; Marsh (Pliny W.), J. Submitted January 13, 1922. (Docket No. 162.) Decided March 30, 1922.

John O'Keefe, *alias* John Wilson, was convicted of disturbing the peace, and sentenced to imprisonment for 90 days in the Detroit house of correction. Reversed, and defendant discharged.

Speed, Ring & Kelly, for appellant.

Merlin Wiley, Attorney General, *Paul W. Voorhies,* Prosecuting Attorney, and *James E. Chenot* and *Robert M. Toms,* Assistants Prosecuting Attorney, for the people.

*Continued from Vol. 217.

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SHARPE, J. The defendant was convicted and sentenced under section 15483, 3 Comp. Laws 1915. The complaint charged that he—

"was guilty of disorderly conduct, for that the said defendant then and there was making and assisting in making a noise, disturbance and improper diversion by which the peace and good order of the neighborhood was disturbed."

The only witness sworn was Police Officer Roche. He testified that while near the corner of Griswold street and Michigan avenue in Detroit he noticed the defendant and another man among a number of people standing in the safety zone waiting to board a street car; that they "seemed to be moving around;" that as the car stopped they—

"began to push and jostle unnecessarily, and at that time I ran from the sidewalk out to where they were;"

that they each had a light overcoat on their arms. Over objection of defendant's counsel, he was permitted to indicate how they apparently jostled one person, the inference being that they were getting ready to pick his pocket. He attempted to arrest both of them, but the man other than the defendant broke away and fled and was not afterwards apprehended.

The court charged the jury that there was no evidence of any noise having been made, that they must confine their deliberations to "disturbance and improper diversion." He further instructed the jury:

"Reference has been made here to a charge of larceny from the person. Now, there is no evidence here, there is no charge or claim here by the people, that the defendant was committing the crime known as larceny from the person, but men who are engaged in that activity, sometimes in the practice of their vocation, will get into a crowd,—the crowd boarding a street car, we will say,—two men working together; one gets in front, the other gets behind, and the victim is in between the two; the man in front jams back,

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the man behind jams forward. Now, it may be that they do not accomplish their purpose of taking any property from the person under these circumstances; it may be that their victim is entirely unaware of the fact that an attempt has been made to take from him his property, but a disturbance of the peace has been created because the right of the citizens to use the streets and the public places in a proper and lawful manner has been infringed upon, and such conduct as that would constitute a disturbance of the peace."

The assistant prosecuting attorney, in his closing argument, said "something to the effect that perhaps a pocketbook was what the defendant was after." An objection and exception was taken to this remark, but it was evidently not deemed improper by the court. He further said:

"I will say one more thing, gentlemen of the jury: In my opinion, under the circumstances of the case and as you ought to know them to exist from what Officer Roche told you, that a verdict of not guilty in this case would comprise in itself a nice invitation for every dip and every pickpocket in the United States to come to Detroit and ply their trade.

"*Mr. Nichols:* I take an exception to that.

"*The Court:* Very well.

"*Mr. Moll:* (Continuing) And with safety and with official sanction.

"*Mr. Nichols:* I ask at this time that this be declared a mistrial.

"*The Court:* I don't think the prosecutor is going beyond the deductions he is entitled to draw from the testimony.

"*Mr. Nichols:* For disturbing the peace?

"*The Court:* From the testimony, I say, not from the charge.

"*Mr. Nichols:* I want an exception."

It seems apparent to us that the defendant was tried and convicted by the jury of an attempt to commit a larceny from the person. We do not think the elements necessary to establish an offense under this statute were proven.

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The statute has long been on our books. It reads, in part, as follows:

"If any person shall make or excite any disturbance or contention in any * * * street, * * * he shall be deemed guilty of a misdemeanor."

As first enacted, the limit of punishment was 10 days. This has, by amendment, been increased to 90 days. In the language of the statute, there must be a "disturbance or contention." It does not appear that any person other than the officer was "disturbed" or that there was any "contention" until he sought to make the arrest. It seems clear to us that the offense charged was not proven and that defendant's motion for a directed verdict of "not guilty" should have been granted. The language of Mr. Justice CAMPBELL in *Ware* v. *Branch Circuit Judge*, 75 Mich. 488, will be found illuminating on the question presented. See, also, 9 C. J. p. 386, and cases cited.

We are frequently asked to reverse cases for improper argument of prosecuting officers. That here complained of had no justification. If the testimony tended to show that the defendant was guilty of an attempted larceny, he should have been so charged. Counsel had the right to draw all reasonable inferences from the proofs submitted which tended to show guilt of the offense charged, but had no right to infer or challenge the attention of the jury to the fact that defendant was committing a crime with which he was not charged.

The conviction and sentence are set aside and the defendant discharged.

FELLOWS, C. J., and WIEST, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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FOX v. DETROIT UNITED RAILWAY.

1. STREET RAILWAYS—PERSONAL INJURIES—RIGHT TO USE OF STREET.

   In an action for personal injuries received at a street intersection in a collision between defendant's street car and a wagon driven by plaintiff, *held*, that defendant had no greater right to the use of the street at the crossing than had plaintiff.

2. SAME — EVIDENCE — NEGLIGENCE — CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

   Where plaintiff's view to the east was entirely obstructed by defendant's standing cars, and, after waiting 5 or 6 minutes for the cars to move, and after looking and listening without detecting the approach of a car, plaintiff proceeded to cross the street, when he was struck by defendant's west-bound car, which, according to the testimony of plaintiff's witnesses, was traveling at the rate of 12 to 15 miles an hour without sounding the gong, the questions of plaintiff's contributory negligence and defendant's negligence were for the jury.

3. NEW TRIAL—EVIDENCE—GREAT WEIGHT OF EVIDENCE.

   The conclusion of the trial court that the verdict was not against the overwhelming weight of the evidence, *held*, supported by the record.

4. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACTION AGAINST THIRD PARTY—ELECTION.

   Although an employee, injured in the course of his employment by collision with a street car, allowed his employer's insurer to pay his hospital and doctor's bills (2 Comp. Laws 1915, § 5434), he did not thereby elect to proceed against his employer under the workmen's compensation act and thus bar his right to bring an action at law against the street railway company (2 Comp. Laws 1915, § 5468), where he made no claim for compensation under the act.

Error to Wayne; Webster (Arthur), J. Submitted

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January 6, 1922. (Docket No. 41.) Decided March 30, 1922.

Case by Fred Fox against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Corliss, Leete & Moody (*Frederic T. Harward*, of counsel), for appellant.

Paterson & Svenson, for appellee.

SHARPE, J. The plaintiff, a man 56 years old, was, on October 24, 1918, driving a horse and wagon to the north on Fifteenth street in the city of Detroit. He was in the employ of Lowrie & Robinson, lumber dealers. He was familiar with the surroundings. Fifteenth street intersects Warren avenue. This avenue has a double line of street car tracks, operated by the defendant. Cars on the north side travel westerly, and those on the south side easterly. Defendant's Warren car house is three blocks to the west. Defendant has air stations on both sides of the avenue between Fourteenth and Fifteenth streets. Plaintiff approached the intersection about 5 o'clock in the afternoon. The cars leave defendant's car house on the east-bound track very frequently at this hour. They stop to take air before proceeding on their trip. As plaintiff approached the crossing, he stopped and waited for three east-bound cars to pass and also a truck being driven in the same direction. The last of the three cars stopped with its rear end slightly protruding into the traveled portion of Fifteenth street, which was 26 feet in width at this point. Plaintiff's view to the east was entirely obstructed by this car. After waiting, as he claims, for five or six minutes, he testified that he looked along the trolley wire, which he could see over the standing car, and also through the glass on it, and could see no signs

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of an approaching car; that he listened and heard no sound of a gong or rumble of the car wheels; that he then attempted to cross, passing close to the standing car, and as soon as he was able to see the track on the north side of the street he discovered a car, which approached him so rapidly that he was unable to get across, his wagon was struck by it and he thrown out and very severely injured. Plaintiff's witnesses testified the car was traveling from 12 to 15 miles per hour, while defendant's witnesses claim its rate of speed was from 2 to 4 miles per hour.

Plaintiff was taken to a hospital and the bill for hospital and doctor's services, amounting to $130, was paid by the insurance company which had furnished indemnity insurance to plaintiff's employers. Plaintiff claims he was to return this money in case he recovered damages from the defendant. When the plaintiff had rested, and also at the conclusion of the proofs, defendant's counsel moved for a directed verdict. The decision on these motions was reserved under the Empson act (3 Comp. Laws 1915, § 14568), and the case submitted to the jury, who rendered a verdict in plaintiff's favor for $5,840. Defendant's motion for a judgment *non obstante veredicto* was overruled, as was also its motion for a new trial. The assignments of error will be considered in the order discussed by defendant's counsel in their brief.

1. Was Plaintiff Guilty of Contributory Negligence? Defendant had no greater right to the use of the street at this crossing than had the plaintiff. The car which struck plaintiff had come from the south on Fourteenth street and then curved sharply onto Warren avenue and ran west. At the rate at which it was traveling, as testified to by plaintiff's witnesses, this car would have traveled the distance between Fourteenth and Fifteenth streets, approximately 330 feet, in about 20 seconds. Had plaintiff alighted from his wagon and

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walked to the point from which he could have obtained a view to the east on the north track, he could not have seen the car in time to be warned of its approach had he returned to the wagon and attempted the passage across. It is true that he could not see the approaching car from where he stopped. He waited five or six minutes to permit the car obstructing his view to move onward. It did not do so. He looked at the trolley wire. The approach of a car would be indicated by the movement of the trolley pole thereon. He saw none. He looked through the windows of the standing car as best he could. He listened, but heard no sound of an approaching car. Whether or not he exercised that care which an ordinarily prudent person would exercise under the circumstances and the surroundings was, we think, a question for the jury.

The decisions of this court relied on by defendant (*Doty* v. *Railway Co.*, 129 Mich. 464; *Clark* v. *Railway*, 168 Mich. 457; *Davis* v. *Railway Co.*, 191 Mich. 131; *Blatnikof* v. *Railway*, 202 Mich. 69) are clearly distinguishable. These were all cases in which a passenger, who had alighted from a street car, passed onto the second track without looking for the approach of a car thereon.

2. Was There Evidence of Defendant's Negligence? There was testimony tending to show that the car which caused plaintiff's injury was traveling from 12 to 15 miles per hour and that no gong was sounded. In view of the condition of the street, congested as it was by defendant's cars, and the fact that one car obstructed the view to the east on Warren avenue, we find no error in the submission of this question to the jury. See *Ommen* v. *Railway Co.*, 204 Mich. 392, and cases cited.

3. Was the Verdict Against the Overwhelming Weight of the Evidence? The trial court concluded

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it was not and with his conclusion we agree. Plaintiff's testimony was corroborated in all its essentials by that of apparently disinterested witnesses.

4. Had Plaintiff Elected to Proceed under the Workmen's Compensation Act? Section 15 of part 3 of the act (2 Comp. Laws 1915, § 5468) provides:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance, as the case may be, the liability of such other person."

Section 4 of part 2 (2 Comp. Laws 1915, § 5434) provides:

"During the first three weeks after the injury the employer shall furnish, or cause to be furnished, reasonable medical and hospital services and medicines when they are needed."

Defendant insists that the plaintiff by permitting the insurance company to pay his hospital and doctor's bills exercised the option given him by the act to proceed thereunder against his employer for compensation. He made no claim for compensation under the act. There was clearly no election on his part to hold his employers liable. As was said in *Brabon* v. *Light & Power Co.*, 201 Mich. 697, 706:

"To *proceed* against the employer is to employ the procedure, the method, pointed out in the statute."

The judgment is affirmed.

FELLOWS, C. J., and WIEST, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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LADA *v.* LASZLO.

JUSTICES OF THE PEACE—JURISDICTION IN SUMMARY PROCEEDINGS—STATUTES.

Since, under 3 Comp. Laws 1915, §§ 13231, 13241, a justice of the peace has jurisdiction in summary proceedings only when the premises in question are located in the township in which he holds office, section 12182, providing that any other circuit court commissioner "or other officer having authority to perform the like duty in the same county," may hear and determine a summary proceeding begun by a circuit court commissioner in case the commissioner is absent or disqualified, *held*, not to extend the jurisdiction of the justice to lands beyond the township in which he is justice.

Error to Monroe; Root (Jesse H.), J. Submitted February 20, 1922. (Docket No. 186.) Decided March 30, 1922.

Summary proceedings by Charles Lada against John Laszlo and another for the possession of certain real property. There was judgment for plaintiff, and defendants appealed to the circuit court. Judgment for plaintiff. Defendants bring error. Reversed, and complaint dismissed.

Elmer J. Alway (*J. C. Lehr*, of counsel), for appellants.

George S. Wright, for appellee.

SHARPE, J. May a justice of the peace hear and determine a summary proceeding begun by a circuit court commissioner under section 12182, 3 Comp. Laws 1915, in case such commissioner is absent or disqualified, *when the land, recovery of possession of which is*

The amendment of section 13231, 3 Comp. Laws 1915, by Act No. 172, Pub. Acts 1919, extending the jurisdiction of the justice to lands in "any adjoining or contiguous city or township," was not called to the attention of the court; but it in no way affects the conclusion reached, as the lands in question did not lie in an "adjoining or contiguous city or township" to that in which the justice resided.—Reporter.

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sought, lies outside the township in which the justice resides?

The section reads as follows:

"Whenever any process shall have been issued by * * * any circuit court commissioner, and on any day set for the return or hearing thereof, such commissioner shall be absent or otherwise disqualified from acting therein, it shall be lawful for any other circuit court commissioner or other officer having authority to perform the like duty in the same county, to assume jurisdiction thereof and to proceed therein, and to hear, try and determine the same, * * * with like effect in all respects as if the original process had been issued by * * * him." * * *

The statute authorizing summary proceedings to recover the possession of lands in certain cases (3 Comp. Laws 1915, § 13229 *et seq.*) provides, in section 13241, that complaint may be made to a circuit court commissioner, or "a justice of the peace, when he shall have jurisdiction under this chapter." Under section 13231, complaint may be made to a circuit court commissioner "or to a justice of the peace of the city or township where the premises are located."

The justice would not have had jurisdiction to receive the complaint and issue the summons for the reason that the lands were not located in the township in which he was a justice. But it is insisted that he may in the cases provided for assume jurisdiction and act if the lands are located anywhere in the same county, by reason of the provision that he may act if he has "authority to perform the like duty in the same county."

This seems to be the first time this question has been raised under this statute. Counsel have not called our attention to, nor have we been able to find, any authority wherein a similar question has been considered. The Constitution provides for the election of four justices in each organized township.

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(Art. 7, § 15.) Section 16 limits their jurisdiction in civil cases and provides:

"They shall also have such criminal jurisdiction and perform such duties as shall be prescribed by law."

Their territorial jurisdiction in civil suits brought before them is carefully defined by the statutes. Except in certain specified cases it is confined to litigation in which the parties are residents of the township in which the justice resides or an adjoining township. The jurisdiction of the justice to act under this statute in cases begun before him depends on the lands being located in the township in which he is a justice. We are persuaded that the provision in question does not fairly express an intention to extend that jurisdiction. His authority to perform the "like duty," that is, to hear and determine the merits of the controversy, the right to the possession of the real estate in question, is confined to lands in the township in which he is justice.

The judgment entered will be set aside and held for naught and the complaint on which it is founded dismissed, with costs to the defendants.

FELLOWS, C. J., and WIEST, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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WALSH *v.* SCHUBINER.

FRAUD—ACTIONABLE MISREPRESENTATION—EVIDENCE—SUFFICIENCY.

In an action for fraud and conspiracy, based upon the representation by defendant that he owned a certain patent, whereby plaintiff was induced to purchase an interest in a lease granting the right to use said patent, the conclusion of the trial court that no actionable misrepresentation was made, *held*, supported by the record, which shows that, whether defendant owned the patent or not, he had the right to grant the privilege secured to the lessees in the lease.

Error to Wayne; O'Brien (Patrick H.), J., presiding. Submitted January 6, 1922. (Docket No. 67.) Decided March 30, 1922.

Case by Albert B. Walsh against Henry Schubiner and another for fraud. Judgment for defendants *non obstante veredicto*. Plaintiff brings error. Affirmed.

Pius A. Walsh, for appellant.

Davidow & Davidow, for appellees.

SHARPE, J. On September 3, 1919, the defendant Schubiner entered into an agreement with the Auto Collapsible Rim Manufacturing Company, of Illinois, whereby he acquired the sole and exclusive right to "make, use and vend and control" a certain invention for converting rims for automobiles into collapsible ones (for which letters patent had been theretofore secured) in the States of Michigan, Ohio and New York. On November 20, 1919, Schubiner entered into a contract with Howard Hatch, Robert A. Keele and George Zangelin, whereby he leased to them certain machinery

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theretofore installed by him for a period of 6 months at a rental of $300, with an option to purchase same for the sum of $2,500. In addition to the rental provided for the lessees agreed to pay the lessor 10 cents as a royalty on each rim converted by them. In the event of the purchase of such machinery, the rights of the lessees to convert rims under the patent was to be exclusive within the county of Wayne. The attention of the plaintiff was called to the business conducted by these lessees by reading an advertisement in a newspaper. After several conferences he, on January 13, 1920, purchased the interest of Zangelin in the lease, paying therefor $500. Soon after plaintiff purchased another third interest from Howard Hatch, paying therefor an additional $500. Before doing so, he called on the defendant Schubiner. He claims Mr. Schubiner told him he owned the patent and that if he purchased it would be all right to strike off the names of Zangelin and Hatch in the lease and insert his, and this was done. Soon after, the defendant Manning called on plaintiff at the shop and, as claimed by plaintiff, represented to him that he had purchased the patent from Schubiner and wanted to purchase plaintiff's rights in the lease. Plaintiff claims that he again called on Mr. Schubiner, who told him "if I had any more dealings to do I would have to do them with Manning as he was disinterested;" that after some negotiations with Manning he turned over to him his rights under the lease and secured therefor a subscription contract for 10 shares (non-assessable) of the capital stock in a company to be organized by Manning to carry on the business. A meeting of the subscribers to this stock was held in March, and plaintiff claims he then learned that Manning was not the owner of the patent; that he again saw Schubiner, who also so stated to him. Manning had been to see

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Schubiner, and on January 29, 1920, had secured from him an agreement to sell to him his interest in the patent and the machinery, but this agreement was not carried out by Manning.

The claim, as set forth in plaintiff's declaration, is, *first*, that he was induced to make the purchase of the second one-third interest in reliance upon the false and fraudulent representations of the defendant Schubiner, and, *second*, that Schubiner and Manning fraudulently conspired together to secure the transfer by him of his interest in the lease to Manning. Before the trial in the circuit, plaintiff executed a release to Manning in consideration of the payment of $400.

The motion of defendant Schubiner for a directed verdict was reserved under the Empson act (3 Comp. Laws 1915, § 14568). The plaintiff had verdict for $600. Afterwards, defendant's motion for judgment *non obstante veredicto* was granted and a judgment entered for him. In granting such motion, the trial court filed an opinion in which the claims of the plaintiff as set forth in his declaration and the testimony tending to support such claims are reviewed at length. With the conclusion reached by him we agree. The record discloses no actionable misrepresentation to plaintiff by the defendant Schubiner. No matter whether or not Schubiner owned the patent, he had the right to grant the privilege secured to the lessees in the lease. Plaintiff's rights thereunder were in no way interfered with until he disposed of them to Manning. As found by the trial court, there is no sufficient evidence to support the charge of conspiracy. Schubiner was doubtless anxious that Manning should succeed in the organization of a company which would enable him to carry out his agreement to purchase. But plaintiff's proofs fall far short of showing a design or intent on Schubiner's part to join with Man-

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ning in a fraudulent effort to deprive plaintiff of his property without compensation.

The judgment is affirmed.

FELLOWS, C. J., and WIEST, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

LANCASHIRE *v.* WAYNE CIRCUIT JUDGE.

1. DISCOVERY — CONVEYANCES — DEEDS — REGISTRATION—CERTIFIED COPIES PROCURABLE.

   An order should not be issued for the discovery of conveyances, in the absence of allegation that they are forgeries or that they are not recorded in the office of the register of deeds, from whom certified copies may easily be obtained.

2. SAME—PRODUCTION OF IRRELEVANT PAPERS NOT NECESSARY.

   An order to produce documents should not include insurance policies not mentioned in the bill or shown relevant by the petition for discovery.

3. SAME—VACATION OF ORDER—AFFIDAVIT—COURT RULES.

   An order for the discovery of the stenographer's minutes of the trial in a foreclosure case and of the subpœna issued and returned served in that case should have been vacated under Circuit Court Rule No. 49, § 5, subd. 3, upon the filing of an affidavit by the party required to make discovery that he has no "knowledge or control" of said minutes, and no "possession or control" of the subpœna.

4. SAME—PRODUCTION OF ORIGINAL WILL NOT NECESSARY.

   An order to produce the original will, presumably in the

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files of the probate court, should be vacated where there is no allegation in the bill of complaint that defendant has surreptitiously removed it therefrom.

5. SAME—PRODUCTION OF INCRIMINATING EVIDENCE CANNOT BE REQUIRED.

One charged with conspiracy to defraud cannot be required to produce correspondence tending to establish his guilt.

6. SAME—PRODUCTION OF TRUSTEES' BOOKS MAY BE REQUIRED.

The trustee of an estate charged with conspiracy to defraud may be required to produce books and documents kept by him as trustee, or copies of them.

Mandamus by Martha I. Lancashire and another to compel Joseph A. Moynihan, circuit judge of Wayne county, to vacate an order requiring the production of certain books and papers. Submitted February 14, 1922. (Calendar No. 29,972.) Writ granted March 30, 1922.

Frederic T. Harward and *William R. Grover,* for plaintiffs.

Entenza & Gramer, for defendant.

SHARPE, J. Mary J. Granger, of Detroit, died in 1892, testate. Her daughter, Sarah J. Granger, and Andrew McLellan were named in her will as trustees to administer her estate and disburse the income as therein directed. Mr. McLellan died in 1894, and the plaintiff James H. McDonald, an attorney, became a trustee in his stead pursuant to the terms of the will and acted as such until April, 1908, when he resigned. Sarah J. Granger then administered the estate until 1917, when she resigned. Joseph G. Lawson was then appointed trustee and acted as such until the death of Sarah J. Granger in 1920, when the trust terminated. In 1897, Joseph H. Duryea, the son of a deceased daughter of Mrs. Granger, gave a mortgage upon all his interest in the estate of his grandmother to one Bert C. Preston. In 1907, this mortgage was

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assigned by Preston to James H. McDonald as guardian of his daughter Martha I. McDonald, later married to one Lancashire. In 1908, and after his resignation as trustee, McDonald as guardian began foreclosure proceedings. Joseph Duryea defended, being represented by an attorney, Max Finkelston. A decree for foreclosure was granted in 1910, sale had by a circuit court commissioner, and purchase made by Mrs. Lancashire. Duryea did not redeem. The time therefor expired on February 23, 1911. In March, 1920, after the trust estate had terminated, Duryea and his wife filed a bill of complaint against Mrs. Lancashire, asking that the foreclosure proceedings be set aside as a cloud on their interest in the estate for the reason that, under the will, Duryea had no such interest in the property of the deceased as could be conveyed or incumbered. To this an answer was filed by defendant, setting up the entire proceeding had and done in connection with the matter by her father as her guardian on her behalf. On May 7, 1920, an order was made making James H. McDonald a party defendant, and on July 5th following an amended bill was filed. In this a conspiracy between McDonald and Finkelston to defraud Duryea out of his interest in the estate is charged. It also contains general allegations of fraud, mismanagement, and misappropriation of funds by McDonald as trustee, and prays for an accounting. An answer was filed, verified under oath by McDonald. Soon thereafter the plaintiffs filed a petition asking that the defendant James H. McDonald be required to produce certain documents, books, records and papers and deposit the originals of the same with the clerk of the court, pursuant to Circuit Court Rule No. 49. An *ex parte* order was made as asked. Defendants then moved to vacate this order. This motion was denied, but afterwards modified and as entered and reviewed here is

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a denial in part. We are now asked to compel its vacation by mandamus

We cannot, within reasonable limits, consider at length the several questions discussed. Defendants insist that if the legal defenses set forth in their answer be upheld, no trial will be had and for that reason the order in question should not have been made. We cannot anticipate such action and feel constrained to pass upon the several requirements of the order. This we will do as therein paragraphed.

1. The first, fourth, fifth, sixth and seventh paragraphs require production of certain conveyances. There is no allegation that any of them are forgeries, nor is there any allegation that they are not all recorded in the office of the register of deeds of the county. Certified copies may easily be procured. Their discovery is, therefore, not indispensably necessary in order for plaintiffs to prepare for the trial of the cause. *Cummer* v. *Kent Circuit Judge*, 38 Mich. 351.

2. The third and fifth refer to insurance policies, no mention of which is made in the bill of complaint, nor does their relevancy appear by any allegation in the petition.

3. The eighth refers to the stenographer's minutes of the trial of the foreclosure case, and the ninth to the subpœna issued and returned served in that case. The defendant, in his affidavit filed in support of the motion to vacate, says he has "no knowledge or control" of the minutes and no "possession or control" of the subpœna. Subsection 3 of section 5 of the rule provides for the vacation of the order—

"Upon the party required to make discovery denying on oath the possession or control of the books, papers or documents ordered so to be produced."

We think his denial meets the requirement of the rule.

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4. The tenth requires production of the original will of Mary J. Granger. This is presumably in the files of the probate court. There is no allegation in the bill that defendant has surreptitiously removed it therefrom.

5. The eleventh, twelfth and thirteenth refer to correspondence between McDonald and Finkelston. The bill charges a conspiracy to defraud on the part of these attorneys. Plaintiff cannot be required to produce evidence tending to establish his guilt. *People* v. *Marxhausen*, 204 Mich 559 (3 A. L. R. 413), and cases cited.

6. The fifteenth, sixteenth, seventeenth and eighteenth require production of books and documents kept by McDonald as a trustee of the estate. These should be open to the inspection of the beneficiaries and the originals, or copies of them, should be produced.

The order as made is vacated and set aside, with leave to renew the motion in the circuit court for an order requiring defendant to deposit such books and documents, or copies of them, within a reasonable time. If copies are produced, their verity may be established on the trial by the production of the originals under subpœna *duces tecum*.

The court may then see to it that the personal rights of the defendant as to his private matters are not invaded.

The plaintiffs herein will recover costs against the plaintiffs in the chancery suit.

FELLOWS, C. J., and WIEST, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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WITKOWSKI *v.* FIDELITY & CASUALTY CO. OF NEW YORK.

INSURANCE—CASUALTY INSURANCE—LIMITING TIME FOR ACTION ON POLICY—STATUTES.

Section 8, chap. 1, part 3, of Act No. 256, Pub. Acts 1917, requiring companies engaging in the casualty insurance business to comply with the laws regulating the business of life insurance in respect to making annual statements of financial conditions "and with all the other requirements so far as applicable," *held*, not to require casualty companies to comply with section 3, chap. 2, part 3, prohibiting the insertion of a clause in their policies limiting the time within which an action thereon could be brought to less than six years after the cause of action accrued.

Error to Wayne; Dingeman (Harry J.), J. Submitted February 1, 1922. (Docket No. 120.) Decided March 30, 1922.

Assumpsit by Joseph Witkowski and others, doing business as Joseph Witkowski & Sons, against the Fidelity & Casualty Company of New York on a policy of insurance. Judgment for defendant on a directed verdict. Plaintiffs bring error. Affirmed.

Frank C. Cook and *John P. O'Hara*, for appellants.

Angell, Turner & Dyer, for appellee.

SHARPE, J. Plaintiffs sue to recover under a policy issued by defendant wherein it agreed to indemnify plaintiffs for loss sustained by the felonious taking of its property by any person. The case was tried by the court without a jury and findings of fact and conclusions of law made and filed. The facts are not in dispute. But one question is presented. The policy issued provides:

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"No suit shall be brought under this policy until after ninety days after the claim for loss, as required in provision No. 13, has been filed with the company, nor at all unless begun within twelve months from the date of the occurrence of the loss. If any limitation set forth in this policy is prohibited by the statutes of the State in which the premises of the assured, as herein specified, are located, such limitation shall be considered to be amended to agree with the minimum period of limitation permitted by such statutes."

The defendant is subject to the provisions of Act No. 256, Public Acts 1917. In this act, the laws of this State relating to insurance and surety business are revised, consolidated and classified. New provisions are incorporated therein. The act is divided into five parts, each consisting of several chapters. It is so accessible that we deem it unnecessary to quote from or set forth its provisions at length. An examination of the act itself will, however, indicate the manner in which the several subjects embraced therein are classified and the provisions relative thereto incorporated therein. Chapter 2 of part 3 contains provisions relative to life insurance contracts or policies. Section 3 makes mandatory the insertion of certain provisions and section 4 prohibits the inclusion of certain others. Among the latter is the following:

"A provision limiting the time within which any action at law or in equity may be commenced to less than six years after the cause of action shall accrue."

Plaintiffs' counsel concede that this provision is not by express language made applicable to the policy sued upon but insist that it is made so by the provision in section 8 of chapter 1 of part 3, which reads as follows:

"Such individuals, companies or associations shall be required to comply with the laws of this State regulating the business of life insurance, in respect to

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making annual statements of financial conditions, and with all the other requirements so far as applicable." * * *

The subdivision in which this section is included relates to companies engaging in the casualty insurance business. They must obtain a certificate showing their authority to do business. Provision is made for the amount of paid up capital required, the deposit of securities with the State treasurer, the reserve fund which must be maintained, the impairment of capital, etc. Chapter 2 of part 1 imposes certain stringent requirements on life insurance companies. Annual statements on such forms as may be furnished by the insurance commissioner must be made and filed, the company must promptly respond to any inquiries made by the commissioner, and books, records and documents must be produced for his examination when required. A considerable penalty may be imposed on any company failing to comply with these requirements. In our opinion, these and perhaps others are the "other requirements" referred to in section 8.

The provisions as to what life insurance policies must contain and must not contain, of which that heretofore quoted forms a part, are set forth in chapter 2, part 3. Section 1 of this chapter reads:

"Every policy of insurance hereafter issued or delivered within this State by any life insurance corporation doing business within the State shall contain the entire contract between the parties." * * *

It is significant that though section 3 contains 13 distinct positive requirements and section 4 four negative ones, that in question relating to the time within which suit must be brought is the only one which could in any way apply to the policy in suit.

We feel constrained to hold, as did the trial court, that the provision in section 8 of chapter 1 does not render the prohibition as to limiting the time within

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which suit must be brought contained in chapter 2 applicable to the policy sued upon. The "other requirements" to which section 8 applies are those of a regulatory character.

The trial court filed an exhaustive opinion from which we have received much aid. In it he traces the history of insurance legislation in this State, from which it appears that though provision was made for the regulation of indemnity insurance in acts independent of those relating to life insurance, no attempt was made to prevent such indemnity companies from limiting the time for beginning suit on the policies issued by them. Without lengthening this opinion to include his review and discussion of these several acts, we may add that their consideration strengthens the conclusion we have reached.

It is, perhaps, not improper to add that there are seemingly good reasons why a limitation of less than 6 years should be provided for in casualty policies. The liability depends upon some unforeseen happening, which plaintiff must establish by proof. The difficulty of meeting such proof in many cases after the lapse of several years is apparent. Similar questions could not well arise in an action on a life insurance policy.

The judgment is affirmed.

FELLOWS, C. J., and WIEST, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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KAWECKI *v.* STUBER-STONE CO.

1. SALES—UNIFORM SALES ACT—BREACH OF WARRANTY—RESCISSION—TENDER.
   Where plaintiff claimed that defendant sold to him a new automobile but instead delivered to him a second-hand one, in order for plaintiff to recover under the uniform sales act (3 Comp. Laws 1915, § 11900) for breach of warranty, he must have returned or offered to return the car received within a reasonable time and in substantially as good condition as when it was delivered to him, unless the deterioration or injury was due to the breach of warranty complained of.

2. SAME—RESCISSION—TENDER—EVIDENCE—SUFFICIENCY.
   Testimony on the part of plaintiff *held*, sufficient to establish the fact that as soon as plaintiff was satisfied that the car delivered to him was a used car he offered to return it and demanded payment back of what he had paid on the purchase price.

3. SAME—PHYSICAL TENDER UNNECESSARY WHERE IDLE CEREMONY.
   Where, when the offer to return the car was made by plaintiff, defendant denied that it was a used car but insisted that it was a new one, the physical tender back of the car is *held*, to have been unnecessary as an idle ceremony.

4. SAME—RESCISSION—OFFER TO RETURN TIMELY.
   Although plaintiff used the car for some time in his business, where there was no evidence that he misused it, and such use and consequent deterioration were due to the fraudulent action of defendant in selling him a used car for a new one, and he offered to return it as soon as he discovered the fraud, the offer to return was timely.

5. SAME—PLEADING—GENERAL ISSUE—NOTICE OF SET-OFF.
   Refusal of defendant's offer of proof as to what the use of the car was worth to plaintiff in his business, where the plea was the general issue with no notice of set-off, *held*, not error.

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6. SAME—UNIFORM SALES ACT—BREACH OF WARRANTY—MEASURE OF DAMAGES.

Instruction by the trial court that plaintiff was entitled to recover the amount he had paid and the price agreed upon as the value of a used car he turned in, *held*, not erroneous, being in conformity with the rule fixed in the uniform sales act (3 Comp. Laws 1915, § 11900).

7. SAME—APPEAL AND ERROR—EVIDENCE—ADMISSIBILITY.

Defendant's complaint that it should have been permitted to show the real value of the car turned in by plaintiff, and that the value agreed upon was a trading value, *held*, without merit, where the record fails to show offer of such proof.

8. SAME—TRIAL—INSTRUCTIONS.

Defendant's complaint of prejudicial remarks by the trial court, and that the charge to the jury was "inconsistent, ambiguous, prejudicial to the defendant and misleading to the jury," *held*, not sustained by the record.

Error to Wayne; Codd (George P.), J. Submitted January 26, 1922. (Docket No. 181.) Decided March 30, 1922.

Assumpsit by Boleslaw P. Kawecki against Stuber-Stone Company for breach of warranty in an exchange of automobiles. Judgment for plaintiff. Defendant brings error. Affirmed.

William J. Griffin, for appellant.

Yerkes, Simons & Goddard, for appellee.

SHARPE, J. The plaintiff, a real estate dealer in Detroit, visited the automobile show in that city in January, 1918. He there saw an Abbott touring car, specially painted, in the exhibit of the defendant, who was distributor of that make of car, then manufactured in Cleveland. Plaintiff concluded to purchase the car, if he could turn in an old Studebaker car he had as a part of the purchase price. He claims his attention was called to some spots of mud on the bottom of the

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car and that he said to Mr. Stuber, with whom he was negotiating, "That is not a second-hand car, is it?" and Mr. Stuber answered, "Why, no; don't think for a minute that we should put in a second-hand car when we could sell one that is new. * * * It is dirty on account of it having been driven from Cleveland to Detroit, and we were late and didn't have time to wash it up good. That is the way the mud is under there now." Plaintiff testified that he "relied upon his statement that it was a new car." The deal was consummated, the defendant accepting plaintiff's car at a valuation of $650, plaintiff making an additional down payment of $100 and executing 10 notes, payable monthly, for the balance of the purchase price of $1,695. These notes were turned over to the Metropolitan Security Company of Cleveland, with the chattel mortgage on the car securing them. The plaintiff paid four of them, when he discovered, as he claims, that the car he had got had been theretofore used. After satisfying himself of this fact, he went to Mr. Stuber's office and told him,

"'I have an old car and I don't want your old car. I paid the price for a new car and I would rather have my money back. I don't want to pay that money for an old car.' He says: 'What are you talking about? I sold you a new car, and this is a new car.' I said, 'You stand on what you said?' and he said 'Absolutely.'"

Leo N. Orton, who accompanied plaintiff, testified as to what was then said:

"Mr. Kawecki said, 'You sold me a second-hand car. I did not pay you money for a second-hand car, I don't want that car, I want the money back and the car is in my garage and you can get it.' And Mr. Stuber wanted to laugh, and he said, 'I sold you a new car and not a second-hand one. I know nothing about it, about the foolish talk you are talking about.' And Mr. Kawecki was excited and walked out and we were not there only about five or six minutes."

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Mr. Stuber testified as to this conversation:

"I don't recollect in detail the conversation had with him on that occasion. My recollection is that he came into the office and claimed that he had discovered he had a car that had been used. I don't remember, and I don't believe he ever made a demand. He just made a statement or claim and walked right out again. I don't think he came in more than a minute or so."

And further:

"*Q.* Do you deny that he said that he wanted the car—he wanted you to take the car back and you could have the car?
"*A.* No.
"*Q.* And he wanted his money back?
"*A.* No, I will not deny it."

The plaintiff soon after began suit to recover the amount paid by him and the value of his old car, and had verdict and judgment for $1,401.88. After suit was begun, the car in question was taken and disposed of by the security company under its chattel mortgage. The defendant insisted that the car sold plaintiff was a new car. This issue was fairly presented to the jury, who found with plaintiff.

1. The first error discussed by counsel was the denial of defendant's motion for a directed verdict because no sufficient tender back was made to entitle plaintiff to rescind. Defendant's counsel insists that in order for plaintiff to rescind he must have returned or offered to return the car within a reasonable time and in substantially as good condition as it was when delivered to him, unless the deterioration or injury is due to the breach of warranty complained of. We think this a fair statement of the rule of law governing rescission in such cases as laid down by section 69 of our uniform sales act (3 Comp. Laws 1915, § 11900) and the authorities construing it. The applicable subdivisions of section 69 are:

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"(1) Where there is a breach of warranty by the seller, the buyer may, at his election: * * *

"(*d*) Rescind the contract to sell or the sale, and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid. * * *

"(4) Where the buyer is entitled to rescind the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for repayment of the price."

The question is whether plaintiff's proofs show a compliance therewith. We think the testimony heretofore quoted, which is substantially all that was said about it, fairly establishes the fact that plaintiff as soon as he was satisfied that the car delivered to him was a used car, offered to return the car and demanded the payment of what he had paid on the purchase price. In view of the defendant's insistence that the car was as represented and his statement—

"I sold you a new car and not a second-hand one. I know nothing about it, about the foolish talk you are talking about"—

we think the jury might well have found that the physical tender back of the car would have been an idle ceremony. The rule is thus stated in 24 R. C. L. p. 293:

"If he would rescind the contract, he must return or tender back the goods to the seller at the place of delivery, unless on making the offer so to do he is relieved of the obligation by a refusal to receive them if tendered. An offer to return, where it is refused, answers the same purpose as an actual return, provided the property is retained for the benefit of the seller whenever he may choose to receive it."

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No claim is made by Mr. Stuber that he would have accepted the car had it been offered to him at his place of business. The declaration of Mr. Stuber may well be treated as a refusal to receive the car if tendered. 35 Cyc. p. 150. While the plaintiff had used the car for some time, there is no evidence tending to show that he misused it. The deterioration in its value was due to such use, and its use by plaintiff was due, under his claim, to the fraudulent action of the defendant in selling him a used car for a new one. We think the offer to return was timely. *Gridley* v. *Tobacco Co.*, 71 Mich. 528, 533.

2. Defendant sought to show what the car in question was worth to the plaintiff in his business. The refusal of such offer was based on the failure of defendant to give notice of set-off. This action is not brought to recover damages due to a breach of the contract. The plaintiff, by rescission, treats the contract as terminated and sues to recover what he has paid defendant and for which he has received no consideration. While plaintiff had used the car for some time, it also appears that he had been compelled to expend a considerable sum in its repair. The plea was the general issue. We think plaintiff's counsel are right in their contention that when attention was called to the plea by the trial court defendant's counsel abandoned such claim.

3. Error is assigned upon the court's instruction as to the measure of damages. Under it the jury were permitted to allow plaintiff the amount he had paid on the Abbott car and the price agreed upon as the value of the Studebaker car. The rules and authorities governing an action for damages for breach of warranty have no application here. By reason of the fraud practiced on plaintiff, as found by the jury, he rescinded the contract. The damages to which he was entitled are fixed by subdivision 4 of section 69, above

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quoted, as the amount which he had already paid on the contract. This was the rule before the adoption of this statute. *Barker* v. *Cleveland,* 19 Mich. 229, 236.

Defendant further insists that the price at which the Studebaker car was taken was but a trading value and not conclusive evidence of its real value and that they should have been permitted to show its actual value. We find no offer to make such proof in the record.

4. Complaint is made of the "prejudicial remarks of the court." We think counsel too critical in this claim of error. Without cumbering this opinion with a lengthy quotation of the ruling of the court and the colloquy with counsel relied on to support it, we are of the opinion that no prejudicial error resulted therefrom.

5. The charge of the court is said to have been "inconsistent, ambiguous, prejudicial to the defendant and misleading to the jury." We have read the instructions with care and are not so impressed. The court specially pointed out that the two questions for the jury to determine were, *first,* whether the car was a new or used one, and, *second,* whether the plaintiff offered to return it within a reasonable time. On the record as made, these were the determinative questions and we think the jury must have so understood and determined them in plaintiff's favor in reaching their verdict.

6. The other assignment discussed does not, in our opinion, merit consideration.

The judgment is affirmed.

FELLOWS, C. J., and WIEST, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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VAN DAM *v.* DOTY-SALISBURY CO.

1. NEGLIGENCE—MASTER AND SERVANT—LIABILITY FOR NEGLIGENCE MAY NOT BE SHIFTED UPON INDEPENDENT CONTRACTOR—INSTRUCTIONS—LANDLORD AND TENANT.

In an action by a tenant against its landlord for damages to its property caused by the falling of a water tank, due to the accumulation thereon of ice, instructions by the trial court that if the tank had become in such condition by an accumulation of ice upon it as to be a liability of the destruction or falling of the tank, the employing of independent contractors to remove the ice would not relieve the defendants, and that if the formation of the ice on the tank was due to defendant's negligence, the fact that its falling was due to the unskilful manner in which said contractors performed their work would not relieve defendant of liability, *held*, proper; since the doctrine of "independent contractor" has no application.

2. SAME—EVIDENCE—DIRECTED VERDICT.

Defendant's claim that it was entitled to a directed verdict because, under the proofs, the fall of the tank was the result of unknown extraordinary causes which the defendant by the exercise of ordinary care and skill could not have avoided, *held*, not sustained by the record, which contains abundant testimony to support the finding of the jury that defendant was negligent.

Error to Genesee; Black (Edward D.), J. Submitted January 27, 1922. (Docket No. 7.) Decided March 30, 1922.

Case by Herman J. Van Dam and John E. Bellamy, copartners as the Auto Parts Tool & Manufacturing Company, against the Doty-Salisbury Company for damages caused by the falling of a water tank. Judgment for plaintiffs. Defendant brings error. Affirmed.

On liability of landlord for damages to tenant's goods for negligence of independent contractor in making repairs, see note in 15 A. L. R. 975.

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Thomas, Shields & Silsbee, for appellant.

Withey & Freeman (*George W. Cook,* of counsel), for appellees.

SHARPE, J. On November 1, 1919, the defendant purchased from the W. A. Paterson Company certain premises in the city of Flint. The buildings erected thereon left an "L"-shaped court in the center, on which stood a water tank constructed of wood, supported about 100 feet above the ground by four legs made of 8-inch angle iron riveted together, each sunk in a concrete foundation. There were 16 cross girders or braces running from one leg to another and also sway rods fastened into the legs between each set of cross girders, forming an "X" on each side. The tank itself was 22 feet high and about 20 feet in diameter, slightly tapering towards the top. Its purpose was to supply a sprinkler system installed in the buildings on the premises. A frost proof casing from the ground to the tank inclosed a pipe which supplied it with water. This was connected with the city water main and when a valve therein was opened and the pressure sufficient it was supplied in that way. When the pressure was not sufficient, the water was forced up by a pump in an engine room adjacent to the court. There was a gauge on the tank to indicate the height of the water, but it was out of order. It was the duty of the man operating the engine to see that the tank was filled daily and that when full the water was turned off. If the water was not turned off and the pressure sufficient, it would overflow the tank. A pipe had been placed near the top of the tank to take care of this overflow, which was led to the ground a little to one side of the tank. There was also a hot water pipe leading from the engine room into the tank to prevent the water from freezing. This heating

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apparatus had also been permitted to get and remain out of order. By agreement, the filling of the tank was intrusted to the Dort Motor Car Company, one of the tenants in the building.

The plaintiffs occupied the basement story of one of the buildings on these premises. They had been tenants under the Paterson Company and continued to occupy under the defendant. John P. McCann was the manager of the defendant company. In the latter part of November, 1919, McCann employed one Jerome Hoffman to paint the tank. In doing so, Hoffman found that the tank was leaking and so reported to McCann, who gave him instruction "to go ahead and repair it." Hoffman discovered that to do so he must empty the tank and McCann obtained permission for him to do so from the insurance company carrying the risk on the buildings. After its repair, the tank was re-filled and occasional reports made to McCann that it was overflowing. This was said to be due to unusual pressure in the city mains. Hoffman was employed to connect the overflow pipe with the city sewer. The water from the overflow became frozen and the ice fastened itself to the tank and its supporting structure. About the 22d of January the condition became alarming. Defendant made inquiry and finally secured the services of two men, John Tyler and John Blackburn, to remove this ice. It was a somewhat dangerous task, owing to the height of the tank. A contract was made with them by McCann to do the job for $50. They began work on the afternoon of January 24th. While working at it, Blackburn climbed to the top of the tank and found the water in it frozen over. He cut a hole in the ice, which was from 8 to 10 inches in thickness. Deeming it necessary, Tyler drew off a few inches of the water in the afternoon and, later in the day, the remainder of it. When they quit work that evening, a considerable quantity of the ice had

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been removed. Parts of it in falling had struck and, as plaintiffs claim, had loosened and weakened the supports of the leg-like structure on which the tank rested. About 11 o'clock that night the tank fell, crushing down through its support and through a portion of the building near by occupied by plaintiffs, almost completely wrecking their plant and putting it out of business.

Plaintiffs brought this suit to recover the damages occasioned thereby. Their declaration counts on a failure to inspect; a failure to keep in repair; a failure to properly operate; a failure to so provide that the tank would not overflow and thus permit ice to form on and in the tank, and a failure to use proper care in removing the ice. The plea was the general issue. Plaintiffs had verdict for $13,127.66, on which judgment was entered. There are many assignments of error. That most strongly insisted on by defendant is that the court erred in not directing a verdict in its favor. This will be first considered.

1. (*a*) It is insisted that—

"under the proofs the fall of the tank was the result of unknown extraordinary causes, which the defendant by the exercise of ordinary care and skill could not have avoided."

(*b*) That if it was due to the negligence of Tyler and Blackburn in the manner in which they did their work of removing the ice or the cutting of the hole in the ice in the tank and drawing off the water under it, they were independent contractors, experienced, competent and skilful for such work, and the defendant is not answerable for any negligence on their part.

The court submitted the first question to the jury. As to the second, he instructed them:

"I charge you it was their (defendants') duty at that time to know the condition and take care of this tank. And if you find it had become in such con-

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dition by an accumulation of ice upon the tank as to be a liability of the destruction or falling of the tank, then I charge you that the employing of Tyler and Blackburn as independent contractors to remove the ice would not relieve the defendants."

He further instructed them that if the formation of the ice on the tank was due to defendant's negligence, the fact that its falling was due to the unskilful manner in which Tyler and Blackburn, as independent contractors, performed their work would not relieve the defendant of liability—in other words that the doctrine of "independent contractor" had no application.

It seems well to dispose of this latter contention first.

(*b*) Defendant relies on the rule stated in 1 Thompson on Negligence, § 621, as follows:

"One who has contracted with a competent and fit person, exercising an independent employment, to do a piece of work not in itself unlawful, or of such a nature that it is likely to become a nuisance, or to subject third persons to unusual danger, attended with danger to others, according to the contractor's own methods, and without being subject to control except as to the results of his work, * * * will not be answerable for the wrongs of such contractor, his subcontractors, or his servants, committed in the prosecution of such work."

This rule is subject to many exceptions. Several of them are noted by the learned writer in the sections following. We are impressed that the facts in this case as claimed by the plaintiffs presented an exception and justified the charge as given. The instruction was predicated on a finding by the jury that the formation of the ice in and on the tank and its supports rendered the structure dangerous to the adjacent property; that such dangerous condition was due to the negligence of the defendant in permitting the ice

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to so form. If such were the facts, a positive duty devolved on the defendant to abate the threatened injury. The performance of such a duty could not be delegated to another as an independent contractor so as to relieve the defendant from the negligent acts of the contractor in its performance. This exception to the general rule is, we think, well established and founded on reason. The defendant, after discovering the condition of the tank and its supports, due to the formation of the ice thereon, was chargeable with notice that it was dangerous to the occupants of the adjoining premises. The duty then devolved on it to remove this danger. While it acted with commendable promptness and let the contract to men recommended by responsible persons, this was not in itself a full performance of the duty. It continued to exist until the danger was removed, and the work of removal could not be delegated to another in a manner to relieve defendant of liability for negligence of that other in its performance.

This exception to the general rule has been recognized by this court. In *Peerless Manfg. Co.* v. *Bagley*, 126 Mich. 225 (53 L. R. A. 285, 86 Am. St. Rep. 537), in speaking of exceptions to the general rule of nonliability, Mr. Justice GRANT said:

"There is, however, another rule, and which may be called an exception to that above stated, viz., that, where one owes an absolute duty to another, he cannot acquit himself of liability by delegating that duty to an independent contractor."

See, also, *Lauer* v. *Palms*, 129 Mich. 671 (58 L. R. A. 67); *Blickley* v. *Luce's Estate*, 148 Mich. 233.

In *Sciolaro* v. *Asch*, 198 N. Y. 77 (91 N. E. 263, 32 L. R. A. [N. S.] 945), it was held that the performance of such a duty could not be delegated so as to relieve the person upon whom the duty rested of liability for its proper performance, and the following from Shear-

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man & Redfield, Negligence (6th Ed.), § 14, was quoted approvingly:

"One who is personally bound to perform a duty cannot relieve himself from the burden of such obligation by any contract which he may make for its performance by another person. Therefore the fact that he may have used the utmost care in selecting an agent to perform this duty, or that he has entered into a contract with any person by which the latter undertakes to perform the duty, is no excuse to the person upon whom the obligation originally rested, in case of failure of performance. His obligation is to do the thing, not merely to employ another to do it."

In *Wertheimer* v. *Saunders*, 95 Wis. 573 (70 N. W. 824, 37 L. R. A. 146), the court said:

"That one upon whom the law devolves a duty cannot shift it over upon another, so as to exonerate himself from the consequences of its nonperformance, is very clear."

See, *Goff* v. *Great Northern R. Co.*, 3 El & El. 672; *Ruff Drug Co.* v. *Western Iowa Co.*, 15 A. L. R. 962 (191 Iowa, 1035, 181 N. W. 408), and note thereto.

(*a*) The jury were instructed that in order for the plaintiffs to recover they must find—

"that the defendants are guilty of negligence in the manner in which they took care of and managed and controlled this tank."

At the request of defendant's counsel, they were also instructed:

"I further charge you that the undisputed proofs in this case show that the ice upon the outside of the tank and upon the structure could, by the exercise of ordinary care and skill on the part of a competent, experienced person, have been removed without danger to any one or to any property."

There was no sufficient reason assigned for permitting the tank to so overflow that such a large body of ice should be formed on it and its supports. There

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was testimony from which the jury could have found that the supports were greatly weakened by the efforts to remove the ice and that such consequences might have been avoided by the exercise of greater care. Large pieces were loosened and permitted to fall and strike the girders and braces. In their request, defendant's counsel concede that this could have been avoided by the exercise of proper care. While no witness so testified, we think the proofs were sufficient to justify a finding by the jury that the fall of the tank was due to the accumulation of ice on or in it or the negligent manner in which the ice removed was taken off, or both of these causes combined.

There are many other assignments of error, but all discussed by counsel relate to the two questions we have considered. We have read the record carefully, given due weight to all claims of defendant's counsel, and feel constrained to hold that the case was fairly tried and that the verdict is not against the great weight of the evidence.

The judgment is affirmed.

FELLOWS, C. J., and WIEST, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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BURNS *v.* TOWNSHIP OF VAN BUREN.

1. MUNICIPAL CORPORATIONS—DEFECTIVE HIGHWAY—PERSONAL INJURIES—NEGLIGENCE—QUESTION FOR JURY.

   In an action against a township for personal injuries alleged to have been caused by a "washout" in the highway, conflicting testimony as to the existence of said defect at the place where plaintiff was injured, *held*, to present a question for the jury.

2. SAME—EVIDENCE—GREAT WEIGHT OF EVIDENCE.

   The finding of the jury that the highway was not "in a condition reasonably safe and fit for public travel," *held*, not so contrary to the great weight of the evidence as to justify setting it aside.

3. SAME—PROXIMATE CAUSE—EVIDENCE—QUESTION FOR JURY.

   The question as to whether plaintiff's injury was caused by her horse becoming frightened, as claimed by defendant, rather than by a defect in the highway, *held*, under the evidence, for the jury.

4. SAME—NOTICE—CONSTRUCTIVE NOTICE—EVIDENCE—QUESTION FOR JURY.

   In view of testimony that the defect in the highway had existed for two weeks, more or less, that the pathmaster made an inspection of the roads once a week, on an average, and that the highway commissioner examined the road once a month, the trial court was justified in submitting to the jury the question as to whether the township had constructive notice of the defect.

5. SAME—TRIAL—INSTRUCTIONS—REQUESTS TO CHARGE.

   Refusal to give certain requests to charge, preferred by defendant, *held*, in view of the charge taken as a whole, not reversible error.

6. APPEAL AND ERROR—TAXATION OF COSTS — REVIEW — CIRCUIT COURT RULE.

   Under Circuit Court Rule No. 65 review of the clerk's taxation of plaintiff's costs may be had only after the trial court has passed upon such action.

On liability of municipality for injury to person or property of one driving over defective highway where his horse is frightened without fault of either party, see notes in 8 L. R. A. (N. S.) 77; 29 L. R. A. (N. S.) 199; L. R. A. 1915D, 243.

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Error to Wayne; Goff (John H.), J. Submitted February 2, 1922. (Docket No. 62.) Decided March 30, 1922.

Case by Corilla F. Burns against the township of Van Buren for personal injuries caused by a defective highway. Judgment for plaintiff. Defendant brings error. Affirmed.

John P. Kirk, for appellant.

Hugh M. Edwards and *George W. Eyster*, for appellee.

SHARPE, J. The plaintiff had verdict and judgment for $2,500 as damages for injuries sustained by being thrown out of a buggy at or near the intersection of the "Romulus road" with the "Coy road" in defendant township, due, as she claims, to a "washout" or "gully" in the highway, rendering it not "in a condition reasonably safe and fit for public travel." The duty of the defendant under the law (1 Comp. Laws 1915, § 4586) to so maintain the highway is pointed out and attention called to section 4584, which makes the township liable for injuries due to a neglect to perform such duty. Defendant denies that the highway was out of repair and insists that plaintiff's fall was caused by her horse becoming frightened and by the right wheels of the buggy being outside the traveled portion of the highway. These questions were submitted to the jury in instructions of which there can be no just cause for complaint. The burden of proof as to both was on plaintiff. Defendant moved for a new trial for the reason, among others, that the verdict was against the great weight of the evidence. It assigns error on the denial of such motion.

1. Plaintiff's witnesses testified that there was a "washout" at the place she was thrown out, that it

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was about 2 feet wide and from 7 to 10 inches in depth, that it extended across the traveled portion of the highway, varying slightly in depth. A number of witnesses called by defendant testified that there was no depression whatever in the highway at the place plaintiff received her injury. While it does not appear that any of plaintiff's witnesses made any actual measurements of the width or depth of the washout testified to by them, neither does it appear that any of the witnesses for the defendant visited the place soon thereafter for the purpose of ascertaining its condition. The conflict in the testimony presented a question for the jury. Under the instructions given, they must have found that the highway was not "in a condition reasonably safe and fit for public travel." The majority of my Brethren are of the opinion that such finding is not so contrary to the great weight of the evidence as to justify this court in setting it aside.

2. It is also urged that the testimony clearly establishes the fact that the horse became frightened at the noise of a cement mixer in use near by and was beyond her control at the time plaintiff fell from the buggy. The court charged that if the fright of the horse was the proximate cause of her injury plaintiff could not recover. She testified that when the horse heard the noise "he simply braced up a little bit; I held up the lines and he went right along. * * * My horse was just going along at an easy gait;" that after she got up out of the ditch into which she was thrown "the horse was walking along the road. * * * The wagon did not turn over." She had a small child with her in the buggy. There was testimony of a number of persons that she told them the horse became frightened and ran away. We think this question was for the jury.

3. Defendant claims there was error in the court's

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refusing to direct a verdict in its favor for the reason that if the highway was out of repair there was no proof of actual notice of that fact to the township officials or any proof from which constructive notice could be presumed. Frank Miller, a justice of the peace in defendant township, testified that he "noticed that washout there or gully. Prior to July, 1917. * * * It was in the month of June." Henry Carpenter testified that it was in the same condition for "two weeks, more or less." The pathmaster, Franklin Robbe, who lived about a mile distant, testified that he made an inspection of the roads in his district "once a week, on an average." Edward O. Leonard, the highway commissioner, testified that he "examined that road during that year once a month." We think the proof submitted justified the submission of the question of constructive notice to the jury.

4. Error is assigned upon the refusal to give certain requests preferred by the defendant. While some of them might well have been given, in view of the charge taken as a whole we cannot say such refusal constitutes reversible error.

5. We are asked to review the clerk's taxation of plaintiff's costs. That we can only do after the trial court has passed upon such action. See Circuit Court Rule No. 65; *Niblock* v. *Saginaw Circuit Judge*, 187 Mich. 423, and cases cited.

The judgment is affirmed.

FELLOWS, C. J., and WIEST, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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BURNS *v.* TOWNSHIP OF VAN BUREN.

DAMAGES—EXCESSIVE VERDICT—HUSBAND AND WIFE.

In an action by a husband for damages caused by personal injuries to his wife, a verdict for $800 was not excessive where there was evidence that he expended in excess of $300 for doctors' and hospital bills and other expenses, that he was deprived of her help and companionship while she was in the hospital, and that her efficiency as a housewife has been lessened by her injuries which may be permanent.

Error to Wayne; Goff (John H.), J. Submitted February 2, 1922. (Docket No. 63.) Decided March 30, 1922.

Case by Richard W. Burns against the township of Van Buren for injuries to plaintiff's wife caused by a defective highway. Judgment for plaintiff. Defendant brings error. Affirmed.

John P. Kirk, for appellant.

Hugh M. Edwards and *George W. Eyster*, for appellee.

MOORE, J. The plaintiff is the husband of Corilla A. Burns. Mrs. Burns brought suit against the defendant to recover damages for injuries she received which were she claims the result of a defective highway. She recovered a judgment of $2,500. Mr. Burns also brought suit and recovered a judgment against the same township in the sum of $800 for the accident. Both cases were brought into this court by writ of error and upon the same record. An opinion was handed down at this term of court in the case of Mrs. Burns. A reference to that opinion

On excessiveness of verdicts in actions for personal injuries other than death, see note in L. R. A. 1915F, 30.

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(*ante*, 40) will make a long statement of facts in the instant case unnecessary.

The decision in the case of Mrs. Burns is decisive of all the questions involved in this case except one. Mr. Burns incurred liability for doctors' and hospital bills and other expenses in excess of $300, and it is claimed those items should be the limit of the judgment, and that the judgment of $800 is excessive. This contention ignores the fact that Mr. Burns was deprived of the help and companionship of his wife while she was in the hospital. It also overlooks the fact that there was testimony that Mrs. Burns has received permanent injuries which have made her less efficient as a housewife during the more than three years that have passed since the accident, and that her lessened efficiency is likely to continue in the future. We do not think that upon this record the damages are excessive. See *Berger* v. *Jacobs*, 21 Mich. 215; *Tunnicliffe* v. *Railway Co.*, 102 Mich. 624 (32 L. R. A. 142).

The judgment is affirmed, with costs to the appellee.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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PEOPLE *v.* BURBY.

CRIMINAL LAW — CONTINUANCE — ABSENT WITNESSES — ABUSE OF DISCRETION—REVIEW.

The granting or refusing of applications for continuance being within the discretion of the trial court, refusal to grant a continuance for absent witnesses, in a prosecution for violating the liquor law, will not be reviewed by the Supreme Court in the absence of a showing of abuse of discretion.

Exceptions before judgment from Dickinson; Flannigan (Richard C.), J. Submitted January 17, 1922. (Docket No. 178.) Decided March 30, 1922.

Claude Burby was convicted of violating the liquor law. Affirmed.

C. D. Dwyer, for appellant.

J. C. Knight, Prosecuting Attorney, for the people.

MOORE, J. At the April, 1921, term of the circuit court for Dickinson county, the defendant was arraigned upon an information charging him with having on or about the 7th day of January, 1921, and upon divers days and times between that date and the 24th day of January, 1921, * * * kept a certain place where intoxicating liquors were sold, etc. On the first day of the April term of said court defendant moved for a continuance of said cause until the next regular term thereof on account of the absence of witnesses he claimed were material. In overruling the motion the judge expressed himself as follows:

"The affidavit does not show due diligence on the part of the defendant to obtain the presence of the witnesses on the trial or their deposition. It is conceded by counsel that at the time the defendant was

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bound over to this court for trial the persons now sought as witnesses were in the county jail. The defendant knew at that time as well as he knows now that the testimony of these witnesses would be material in his defense; he also knew as the affidavit for continuance shows, that they were 'lumberjacks' and had no permanent place of residence, and he must have known that if he allowed them to leave Iron Mountain there would be difficulty in finding them. For some days at least, according to the concession of counsel, the witnesses were here and were known by the defendant to be here and to be subject to subpœna, and notwithstanding his further knowledge that they were roving characters and if allowed to leave without being subpœnaed their presence at the trial, at this or any further terms, was extremely doubtful if he did not cause them to be subpœnaed. Furthermore, he did not at any time since the witnesses left Iron Mountain take out and place in the hands of the sheriff a subpœna for these witnesses. Instead, he trusted to his own ability alone to find the witnesses. Where he failed the sheriff's office might have been successful. The motion is denied, not only because of want of diligence on the part of the defendant to procure the attendance of the witnesses, but also because the court is satisfied from all the surroundings that the application for a continuance is made for the purpose of delay only."

The case was tried and defendant was convicted. The case is here on exceptions before sentence.

In his original brief counsel confines his argument to the question of whether the court abused its discretion in refusing the continuance. We quote from the brief:

"The discretion of the court must operate along reasonable and fair lines, or we submit that discretion has been abused and should be reviewed. Respondent in this case having been called to the bar to answer a charge, which on conviction, carried with it a prison sentence, upon a showing that two important witnesses to the transaction about which he was being tried could not be produced at that term, and the unquestioned diligence the affidavit shows he pursued to get them into court was entitled, it appears

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to us, to a fair judgment and a reasonable discretion on the part of the trial court. and a continuance of said cause."

This court has repeatedly held that the granting or refusing applications for continuances is within the discretion of the trial court, and unless it is shown that his discretion was abused, this court will not review his action. Some of the cases are *People* v. *Foote,* 93 Mich. 38; *People* v. *Burwell,* 106 Mich. 27; *McNaughton* v. *Evart,* 116 Mich. 141; *People* v. *Boyd,* 151 Mich. 577; *Roney* v. *Healy,* 170 Mich. 46; *People* v. *Eamaus,* 207 Mich. 442; *People* v. *Eamaus,* 207 Mich. at p. 455.

There is no statement in the affidavit of what defendant expected he could prove by the witnesses.

In a supplemental brief counsel says the defendant had a right to assume that the names of the two witnesses, whose absence was the basis of his motion, would be indorsed on the information and that they would be called as *res gestæ* witnesses. This claim was not made in the original brief, and there is nothing to indicate that a motion upon that subject was made in the court below. What occurred upon the trial of the case does not appear in the bill of exceptions. The names of these men do not appear in the information. We find no reversible error upon the record as presented here.

The verdict is affirmed, and the case is remanded for further proceedings.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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PEOPLE v. GARVEY.

1. CRIMINAL LAW—CROSS-EXAMINATION—ABUSE OF DISCRETION.
   Where great latitude in the cross-examination of a witness was allowed, and counsel took no exception to the ruling of the court limiting same, no abuse of discretion or harmful error is shown.

2. SAME—APPEAL AND ERROR—ASSIGNMENT OF ERROR TOO VAGUE TO BE CONSIDERED.
   An assignment of error based on permitting leading questions without calling attention to any particular question, counsel saying "A brief survey of the record shows the type of questions put to these witnesses," *held*, too vague to be considered.

3. SAME—REBUTTAL PROOF.
   Error in not limiting rebuttal proof, *held*, not shown by the record, where the testimony about which complaint is made was limited to the period of time and to the situation about which his counsel had examined defendant in great detail.

4. SAME—INTOXICATING LIQUORS—EVIDENCE—SUFFICIENCY — QUESTION FOR JURY.
   In a prosecution for violating the liquor law, conflicting testimony *held*, to present a question for the jury.

Exceptions before judgment from Newaygo; Barton (Joseph), J. Submitted January 13, 1922. (Docket No. 163.) Decided March 30, 1922.

Reuben Garvey was convicted of violating the liquor law. Affirmed.

Willard G. Turner, Jr., for appellant.

William J. Branstrom, Prosecuting Attorney, for the people.

MOORE, J. The defendant was convicted of selling

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moonshine whisky on the fourth day of July, 1921. The case is here on exceptions before sentence.

The assignments of error are discussed by counsel under four heads:

(1) Errors of the court in limiting attorney for the defendant in his questions to Clyde Hutchinson.

(2) Errors in permitting the prosecuting attorney to pursue, over objection of counsel for defendant, a course of successive leading questions in his examination of witnesses for the people.

(3) Error of the court in permitting Noble McKinley, a witness for the people, to testify as to results of an examination made of defendant's home and adjacent premises, over objection of defendant's counsel, on Saturday, following Monday, July 4th, the time at which the alleged offense occurred.

(4) That the verdict of the jury was against the great and overwhelming weight of the evidence in this cause.

We will discuss the errors in the order in which counsel presents them:

1. Did the court err in limiting the cross-examination? Counsel was allowed great latitude in the cross-examination of Mr. Hutchinson. Nearly six pages of the printed record are filled with this cross-examination. Counsel took no exception to the ruling of the court. We do not think any abuse of discretion or harmful error in this regard is shown.

2. Did the court err in permitting leading questions? Counsel does not call attention to any particular question, but contents himself with saying in the brief:

"A brief survey of the record shows the type of questions put to these witnesses."

This is too vague to require this court to discuss the question.

3. Did the court err in not limiting rebuttal proof? An examination of the record shows that the testimony about which complaint is made was limited to the period of time, and to the situation about which

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his counsel had examined the defendant in great detail. There was no error under this head.

4. Was the verdict against the great weight of the evidence? We quote some of the testimony:

"*Witness* (continuing): He had a car there and I went to the car and got the liquor. It was wrapped up in paper. It was in the can that I let him have in the morning or one that I thought looked like it. I paid him $4 for it. I drank the liquor and it was intoxicating. I got intoxicated. Mr. Horton drank some of it."

Mr. Horton testified substantially the same. There was other testimony along that line. It is true defendant and his witnesses denied that he made any sale, but this made a question for the jury. There was no motion for a new trial. We discover no reversible error.

The verdict is affirmed.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

MARTIN v. TRAUTZ.

MECHANICS' LIENS — SERVICE OF NOTICE — VALIDITY — TECHNICAL DEFENSE — REMEDIAL STATUTE.

On appeal by the defendants from a decree in favor of plaintiffs, in a suit to enforce a mechanics' lien on property held by husband and wife, the defense urged by defendants that the service of the order required by 3 Comp.

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Laws 1915, § 14801, establishing the lien, was defective, *held*, under the evidence, too technical, in view of section 14822 declaring the statute to be remedial and to be construed liberally.

Appeal from Wayne; Mayne (Frederick W.), J., presiding. Submitted January 26, 1922. (Docket No. 141.) Decided March 30, 1922.

Bill by Harry J. Martin and another, copartners as the H. J. Martin Company, against Michael Trautz and others to foreclose a mechanics' lien. The Hamtramck Lumber & Supply Company filed a cross-bill to foreclose a mechanics' lien. From a decree for plaintiff and cross-plaintiff, defendants Trautz appeal. Affirmed.

Frank C. Cook and *John P. O'Hara*, for plaintiffs.

Frank Day Smith, for cross-plaintiff.

Stellwagen, MacKay & Wade, for appellants.

MOORE, J. The plaintiff, the H. J. Martin Company, and the cross-plaintiff, the Hamtramck Lumber & Supply Company, filed mechanics' liens on October 17, 1919, and November 17, 1919, respectively, the former for $522.37 with interest, and the latter for $405.97 with interest, on the property owned by Michael Trautz and Kathryn Trautz, husband and wife. From a decree in favor of the appellees the case is brought here by the appellants by an appeal.

It is the contention of the defendants that the service of the order establishing the Martin Company lien under this claim was defective, counsel citing *Hannah & Lay Mercantile Co.* v. *Mosser*, 105 Mich. 18, and *Zilz* v. *Wilcox*, 190 Mich. 486, 492.

Section 14801, 3 Comp. Laws 1915, provides:

"SECTION 6. Every person filing such statement or account as provided in the preceding section, except

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those persons contracting or dealing directly with the owner, part owner or lessee of such premises, shall, within ten days after the filing thereof, serve on the owner, part owner or lessee of such premises, if he can be found within the county, or in case of his absence from the county, on his agent having in charge of such premises within the county wherein the property is situated, a copy of such statement or claim," etc.

At the outset the appellees insist the case is not properly here because the record shows as follows:

"Plaintiffs herein filed their sworn bill of complaint to foreclose their mechanic's lien. Defendants filed an unsworn answer. Upon the hearing plaintiffs offered their bill with the answer of defendants in evidence, and they were received as *prima facie* proof of plaintiffs' claim.

"Paragraph 6 of plaintiffs' bill reads as follows:

"'That thereafter on, to-wit: the 21st day of October, A. D. 1919, your orators caused copies of said statement of account and claim of lien to be personally served upon Michael Trautz and Kathryn Trautz, his wife, the owners of the premises, against which said lien is claimed due, proof of service of which said lien has been properly made.'

"Defendants Michael Trautz and Kathryn Trautz, in their unsworn answer, replied to paragraph 6 of plaintiffs' bill as follows:

"'They admit the allegations contained in paragraph six of the bill of complaint.'

"No question of any kind was ever raised by defendants about the service in this matter until the day of hearing, when Mr. Wade, as attorney for defendants Trautz, began to cross-examine Harry J. Martin in reference to the service he made of the claim of lien.

"Upon the objection by the attorneys for the plaintiffs to any testimony regarding the service of the claim of lien being raised, because of the answer of defendants admitting such service, the attorney for defendants asked leave to amend his answer to show that there was personal service on Mrs. Trautz. No

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amendment of any kind to defendants' answer was ever allowed by the court. The only reference to the allowance of the amendment requested is as follows:

"*Mr. Wade:* Does your honor rule on the amendment?

"*The Court:* All right. You may proceed. I haven't passed upon that yet."

The court proceeded to try the case upon the merits and, after all the testimony was taken, said in part:

"The court will hold that the service was good in the case of the Hamtramck Lumber Company. I will find this, that whether it is a fact that Mrs. Trautz was in or without the county, it is apparent to me that Mr. Smith was given to understand that she was outside of the county, and that he acted in good faith in trying to obtain personal service upon her, and was led to believe by the action of Mrs. Trautz and her husband, particularly Mr. Trautz, that she was not within the county, and that she was not—it was impossible for him to obtain personal service, and that he therefore made all the service that was possible under the circumstances. * * *

"In other words Mr. Smith apparently was seeking to obtain service; he knew what was necessary and he went to Mr. Trautz's home; it was at that hour of the day when Mr. Trautz ordinarily would have been in the dining room eating supper. * * *

"Now it is inconceivable to me how Mr. Smith, acting for the express purpose of making a legal service, could have gone there and stayed without asking where she was, or making some inquiry, or making some effort to find her. According to Mr. Trautz, who, I take it, did not know at that time—didn't know that personal service was necessary upon Mrs. Trautz, and it would not be so impressed upon his mind as it would be upon Mr. Smith's. But at any rate, Mr. Smith was there; he put himself to some inconvenience and expense. He had been there several times, and it is inconceivable to me that he would have proceeded indifferently in reference to the presence of Mrs. Trautz, and for that reason I think his statement is correct and I take his version of it.

"In relation to the service in the case of H. J. Martin

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Company, a copartnership composed of Harry J. Martin and Randall E. Martin, I find that service of a copy of the claim of lien was made upon Michael Trautz upon the premises affected by said lien by Harry J. Martin within the prescribed time, and that at the same time Michael Trautz informed the process server that Kathryn Trautz, his wife, was in a serious physical condition, and that it would be impossible for him to see her, but that he, her husband would take her copy and would accept service for her. The server thereupon gave both copies to Michael Trautz, and while he was still upon the premises and in the hallway of the house thereon, Kathryn Trautz appeared and came down stairs into the presence of her husband and the server. Thereupon Michael Trautz handed to his wife, Kathryn Trautz, in the presence of Harry J. Martin, the copy of the claim of lien, which he accepted for her. I also find that Michael Trautz read to Kathryn Trautz the contents of the claim of lien, and that she was fully informed of its portent. The defendants Michael and Kathryn Trautz now raise objection to this service and say that it was not a personal service upon Kathryn Trautz. * * *

"I think under the circumstances there is such a service as under the law would be considered personal service, there having been duly established the liens for the amounts claimed with interest and taxable costs."

We quote some of the testimony. Mr. Martin is the witness:

"*Q.* Did you tell Mr. Trautz what your business was when he got into the house?

"*A.* Yes.

"*Q.* Did you tell him that you wished to serve a copy of this lien—claim of lien upon him?

"*A.* Yes.

"*Q.* What did Mr. Trautz say?

"*A.* Mr. Trautz said that his wife was in an exhausted condition—nervous, exhausted condition; that I couldn't see her to serve the lien papers on her. and he insisted that I couldn't see her, that she could not be seen; that she was in such a condition that it would

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be ridiculous to see her; and at that time Mrs. Trautz wanted to know what all was going on, and she called down stairs and came down stairs and the daughter and the aunt came down stairs. * * *

"Q. When Mrs. Trautz came down stairs who had copy of the lien?

"A. Mr. Trautz.

"Q. Did he have both of them?

"A. He had both of them.

"Q. How did it happen that he had both of them?

"A. I insisted upon seeing her, and he wouldn't allow me to see her and as a gentleman I wouldn't go upstairs to see the wife and serve it on her, and he insisted upon *handing it to her for me.*

"Q. Did you consent to that?

"A. I did.

"Q. So that when Mrs. Trautz came down Mr. Trautz had both copies?

"A. Yes.

"Q. You said that they—that she wanted to know what was going on?

"A. Yes.

"Q. Did you explain to her?

"A. No, I didn't; Mr. Trautz—

"Q. Did anyone explain to her?

"A. Mr. Trautz told her it was about that building, and that—

"Q. What did he say it was about?

"A. I don't remember his statements, but it was to the effect that I was serving papers for a lien. He did it in a roundabout way, so that it wouldn't be taken to be—

"Q. Did you say anything to him then about giving a copy to Mrs. Trautz?

"A. No.

"Q. Did he say to you when he took both of them that he would give one to Mrs. Trautz?

"A. Yes, he did.

"Q. While Mrs. Trautz was there—while both Mr. Trautz and Mrs. Trautz were in your presence, did Mr. Trautz give one copy of the claim of lien to Mrs. Trautz?

"A. Yes, he did. * * *

"Q. So that there is no doubt but what that copy

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of the claim of lien was placed in the hands of Mrs. Trautz personally in your presence?

"*A.* No, there is no doubt.

"*Q.* You saw that done?

"*A.* Yes."

We now quote from Mr. Smith's testimony:

"*Q.* As a representative of the Hamtramck Lumber Company, in this particular instance, did you serve a copy of your claim of lien upon Mr. Trautz and Mrs. Trautz?

"*A.* I did. * * * After I had filed the lien for the Hamtramck Lumber Company I took two copies of the lien to serve upon Michael Trautz and Kathryn Trautz. I took two copies of them after they were filed and went to look for Mr. and Mrs. Trautz, Michael Trautz and Kathryn Trautz. I went to their home on 123 Puritan avenue every day during the entire ten days with the exception of Saturdays and Sundays. * * * I can't exactly say how many times but several times I stopped in the morning to get service on Mr. and Mrs. Trautz. * * * I telephoned Mr. Trautz and I told him I had a lien to serve on he and his wife, that I had called at the place of residence several times but was unable to find either one at home, and I asked him when I could make service. He said, 'You can see me any time after 6:30, but you cannot see my wife.' I said 'Why.' 'Well' he says, 'she is not feeling well.' * * * I explained to him that I had to make personal service and I explained to him that I must hand it to her personally. 'Well' he said, 'she is all shot, she is in bad shape and a nervous wreck and you cannot see her, and you can serve me. I will take all papers.' When I saw his attitude I didn't argue any further, but went out to his house the next evening at 6:30 and met Mr. Trautz at his home and asked him where his wife was and he said she was—had gone South—he mentioned the place, but I have forgotten, but I remember distinctly as I figured, out of the county and out of the city, and therefore it seemed to remove all possibility of serving her within the county. I talked to Mr. Trautz at least one hour and one half because he was very much worked up over this matter and I sat in his home. During the entire hour and a half

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I heard no woman's voice; I heard no other noise except our own talking; and I believed she was, as he told me on the visit, and he said she had gone on a visit to get her health back, that is, to get her nerves in shape. Then after he had told me that, I then served him, or I then served her, by delivering a copy to him, and gave him a copy of the lien for himself and one for Mrs. Trautz * * * and I asked him if he was her agent, having charge of the premises, because I thought it necessary to put in that little paragraph, and he said, 'yes, certainly, I have charge of the premises. This is mine.' "

Mr. Trautz did not agree with Mr. Smith's statement that he told him his wife was away, and his testimony was in conflict with that of Mr. Martin and Mr. Smith in other respects. Mrs. Trautz was not a witness, nor was her deposition taken.

The instant case is quite unlike the two cases, *supra*, cited by counsel for the appellants. The trial court believed the testimony of Mr. Martin and Mr. Smith, and did not believe the testimony of Mr. Trautz where it was in conflict with theirs. What was said in a recent case in this court is germane:

"Upon this testimony the trial judge who saw the witnesses concluded that notice was served, and sustained the lien. We are satisfied that he was right in his conclusion." *Acme Lumber Co.* v. *Construction Co.*, 214 Mich. 362, 363.

Section 27 of the mechanics' lien law (section 14822, 3 Comp. Laws 1915) reads:

"This act is hereby declared to be a remedial statute and to be construed liberally to secure the beneficial results, intents and purposes thereof; and a substantial compliance with its several provisions shall be sufficient for the validity of the lien or liens hereinbefore provided for and to give jurisdiction to the courts to enforce the same." * * *

The statute was construed recently, we quote:

"In such consideration we shall be guided by the

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rule that the proceedings are statutory, that the essential requirements of the statute leading up to the attaching of the lien must be complied with and the provisions of the statute in that regard must be strictly construed. *Smalley* v. *Terra Cotta Co.*, 113 Mich. 141. But this does not mean that such provisions shall be 'strangled by technicalities,' or that a forced or a strained construction should be indulged in order to defeat the lien." *Acme Lumber Co.* v. *Construction Co.*, 214 Mich. 360.

The defense urged is too technical.

The decree is affirmed, with costs to appellees.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

GREEN *v.* DETROIT UNITED RAILWAY.

1. STREET RAILWAYS—NEGLIGENCE—EVIDENCE—SUFFICIENCY.
   In an action against a street railway company for personal injuries caused by a collision between plaintiff's automobile and defendant's street car at a street intersection, testimony *held*, sufficient to show negligence on the part of defendant.

2. SAME—CONTRIBUTORY NEGLIGENCE—ORDINANCES—RIGHT TO RELY UPON OBSERVANCE OF ORDINANCE.
   In view of an ordinance of the city of Detroit requiring street cars to stop at crossing on signal to take on passengers, where plaintiff approaching the crossing saw a number of persons standing in the safety zone waiting for a car, the question as to whether or not he had a right to expect that the car would stop to take on said

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On the question of attempting to cross street in front of observed street car as contributory negligence, see note in L. R. A. 1917C, 692.

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passengers was properly submitted to the jury, as bearing upon the question of plaintiff's contributory negligence.

Error to Wayne; Law (Eugene F.), J., presiding. Submitted January 24, 1922. (Docket No. 134.) Decided March 30, 1922.

Case by Max Green against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Corliss, Leete & Moody (*Frederic T. Harward,* of counsel), for appellant.

Louis H. Wolfe and *Benjamin & Betzoldt,* for appellee.

MOORE, J. Plaintiff, on November 15, 1919, was driving his automobile east on Ferry avenue in Detroit. His automobile came in collision with a car owned by the defendant which was going south on Chene street. He received injuries and he brought this suit to recover his damages. At the close of the testimony offered on the part of the plaintiff, and again at the close of all the testimony, the defendant's attorney moved for a directed verdict in its favor. The judge overruled both motions. The case was submitted to a jury which returned a verdict in favor of the plaintiff in the sum of $5,000. The defendant moved for a rehearing for the following reasons:

(1) Because said verdict is excessive.
(2) Because said verdict is contrary to the overwhelming weight of evidence.
(3) Because the court erred in failing to direct a verdict for the defendant by reason of the contributory negligence of the plaintiff.

The trial judge overruled this motion, filing his reasons in great detail. The case is brought here by writ of error.

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Counsel present the same reasons in this court why there should be a reversal of the case that they did in asking for a new trial, with the following additional reasons:

(*a*) The court erred in charging the jury in regard to the ordinance relating to speed of street cars inasmuch as the ordinance provided for an average rate of speed and the testimony was lacking in this respect.
(*b*) That the court erred in charging the jury in regard to the ordinance relating to street cars stopping on signal for passengers, as under the testimony in this case, this ordinance had no bearing on the question in issue.
(*c*) There was no actionable negligence proven on defendant's part.

The last named reason is presented in this court for the first time. When counsel first moved for a directed verdict he said:

"*Mr. Harward:* I move, your honor, at this time, to direct a verdict for the defendant on the ground of the contributory negligence of the driver, of the plaintiff—of course, if his testimony is true, and the testimony of some of the witnesses, there may be evidence of negligence on the part of the defendant, but it seems to me that under the testimony here, the plaintiff himself was careless of his own safety."

The record discloses an abundance of testimony which, if believed, showed negligence on the part of the defendant.

In overruling the motion for a new trial the judge said in part:

"In this cause plaintiff sued defendant to recover damages for personal injuries which he claims to have suffered as a result of the negligence of defendant's employees in operating a street car at the corner of Chene street and Ferry avenue in the city of Detroit on the 15th day of November, 1919, at about 2 o'clock in the afternoon. The weather was fair and the pavement dry. Chene street runs in a northerly and southerly direction and Ferry avenue crosses it at

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right angles. There was a single street railway track on Chene street over which defendant's street cars ran but one way, from north to south. This crossing is within the three-mile circle from the geographical center of Detroit, and the testimony shows it to be a somewhat busy place as to traffic. Plaintiff was driving a Buick, two seated touring car known as a 'Light Six,' easterly on the south side of Ferry avenue, and the street car was coming from the north on Chene street; the front curtains of plaintiff's automobile were rolled up but the rear curtains were closed. There is some evidence tending to show that at a point about 70 feet north of the north line of Ferry avenue the street car was moving at the rate of 30 to 35 miles per hour. Plaintiff was entirely familiar with this location. Plaintiff testifies that he stopped his automobile about in the line of the curb on the west side of Chene street 20 feet from the street car track and looked, and that the street car was then coming about 200 feet north of Ferry avenue. At this point there were no objects in the line of plaintiff's vision to obstruct his view of the street car coming from the north. At this time some people were standing in the protected area for passengers to take the southbound Chene street cars at a location on the west side of Chene street just north of the north line of Ferry avenue. Plaintiff testified that he expected the street car to stop to take on these passengers. However, the car did not stop.

"An ordinance in force in the city of Detroit provides that street cars shall stop at street crossings to take on passengers on signal. This court will take judicial notice of the established custom that when people are standing in the protected areas at street crossings in the city of Detroit, it is a signal for the street cars to stop to take them on as passengers. This street car did not stop for the reason that it was fully loaded, and at about the middle of the block north of Ferry avenue, the conductor gave the motorman a signal of two bells to indicate to him that the car should not be stopped at Ferry avenue to take on more passengers.

"After stopping and looking as above related, plaintiff testifies that thinking he had time to safely cross

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the street car track, he started his automobile at first or lowest speed. He testifies he looked again and saw the street car about 200 feet or more distant and he still thought he could cross the street car track with safety for he still expected the street car to stop to take on the waiting passengers and proceeded at a speed of 4 or 5 miles per hour, and that when the front end of the car had reached a point close to the west rail of the street car track (given by him as one foot on direct and five feet on cross-examination), he saw the street car coming 70 or 75 feet away at a speed of 25 or 30 miles per hour. He testifies that he then concluded it dangerous to attempt either to try to stop or to go ahead and he then turned his automobile to the right thinking he could make the turn and escape the street car by going south on the west side of Chene street between the street car track and the curb, but after plaintiff started to make this turn the street car struck his automobile near the left front wheel and he was thrown to the pavement and injured."

What is said above by the trial court as to the effect of the testimony offered on the part of the plaintiff is borne out by the record.

The testimony offered on the part of the plaintiff was to the effect that before entering upon the danger zone he stopped and saw the car so far away that he was justified in thinking he could cross in safety, and that he would have been able to do so had the motorman been in the exercise of due care. As to this feature of the case it is within *Ryan* v. *Railway Co.*, 123 Mich. 597; *Chauvin* v. *Railway Co.*, 135 Mich. 85; *Deneen* v. *Railway Co.*, 150 Mich. 235 (13 Ann. Cas. 134); *Deitsch* v. *Traction Co.*, 155 Mich. 15; *Theisen* v. *Railway*, 163 Mich. 68; *Putnam* v. *Railway*, 164 Mich. 342; *Erdman* v. *Railway*, 175 Mich. 691; *Powell* v. *Railway*, 206 Mich. 698.

Was the verdict against the weight of the evidence? This court has considered that subject in the following cases: *Gardiner* v. *Courtright*, 165 Mich. 54; *Fike* v.

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Railroad Co., 174 Mich. 167; *Druck* v. *Antrim Lime Co.*, 177 Mich. 364; *Porth* v. *Cadillac Motor Car Co.*, 209 Mich. 89; *Lignell* v. *Bruhns*, 211 Mich. 346; *Mapes* v. *Boersma*, 216 Mich. 106.

The trial judge was decidedly of the opinion that the verdict was not against the weight of the evidence, and we see no occasion to disturb his finding in that regard.

Counsel complain of that portion of the charge relating to the ordinances. We quote from the charge:

"In considering the contributory negligence of the plaintiff himself, you have a right to take into consideration the two ordinances which have been introduced in evidence, *first*, that at this particular part of the line the ordinance prohibits the running of street cars at a rate of speed in excess of an average of 10 miles an hour, and *second*, that the ordinance which provides for street cars—that street cars shall stop on signal to take on passengers desiring to board a car; whether or not plaintiff had a right to expect that the car would stop to take on passengers may be considered by you as bearing upon the question of whether or not he was guilty of contributory negligence in attempting to cross Chene street with his automobile at the time in question.

"This question is whether a reasonably prudent man on approaching the intersection of Ferry (Warren) and Chene street and seeing a car approaching, as plaintiff did see it, and seeing a number of persons standing near the street car track or in the safety zone, would have a right to rely on the fact that the street car would stop to take on these passengers.

"You remember that ordinance provides that cars shall stop on signal. There is no evidence in this case that any signal was given, but the question of whether or not it is not a signal in itself for people to be standing in a protected area when a car goes by, is a question for you gentlemen to consider."

We think this charge was justified by the testimony and by what is said in *Theisen* v. *Railway*, 163 Mich. 68, and *Putnam* v. *Railway*, 164 Mich. 342.

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The other assignments of error have had our consideration but we deem it unnecessary to discuss them. We find no reversible error.

The judgment is affirmed, with costs to the appellee.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

THE JENNINGS FARMS v. WATSON-HIGGINS MILLING CO.

SALES—PLEADINGS—ISSUE PRESENTED.

In an action for the purchase price of a car load of wheat, where defendant admitted receiving the wheat but claimed that the original contract was canceled and the wheat received to be disposed of on commission, which was disputed by plaintiff, the issue as to whether the wheat was received under the original contract or under a substituted one was properly submitted to the jury.

Error to Newaygo; Barton (Joseph), J. Submitted February 7, 1922. (Docket No. 113.) Decided March 30, 1922.

Assumpsit by The Jennings Farms against the Watson-Higgins Milling Company for the purchase price of certain wheat. Judgment for plaintiff. Defendant brings error. Affirmed.

Rolland J. Cleland, for appellant.

William J. Branstrom, for appellee.

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MOORE, J. The declaration in this case contains two counts in assumpsit. The suit was brought to recover the purchase price of a car load of wheat sold by plaintiff to defendant. The plea was the general issue with a notice thereunder.

"that the car load of wheat in question was purchased September 20th, for shipment on or before ten days from date; that it was not so delivered, and notice of cancellation was given by telephone; that a new agreement was made by which the said car load of grain was consigned to defendant to be handled for the account of the plaintiff."

The original sale was made by telephone. This was followed by a letter reading:

"JENNINGS FARM,
Bailey, Mich.

"*Gentlemen:* We are pleased to confirm the following purchases from you today by

"Cars, 1; Bushels 1,500; Commodity, No. 2 Red Rock Wheat; Price $2.38; F. O. B., Bailey; Time shipment, Prompt.

"Destination lot and inspection final. Under Federal supervision when obtainable. Our option to cancel purchases or buy for your account if shipments are not made in contract time. Make draft on us here, leaving a margin of.....cents per bushel to cover contingencies in weight and grade. To insure payment of drafts, be sure that proper ROUTE and RATE appear on Bill of Lading. If above is not as understood please wire us at once. Please draw at sight through Kent State Bank.

"Yours truly,
"WATSON-HIGGINS MILLING CO.
"Grand Rapids, Mich., Sept. 20, 1920.
"Per L.H.H."

Early in the trial a colloquy occurred as follows:

"*The Court:* Now Mr. Cleland, the declaration in this case which avers and sets forth sufficiently I assume. because you raise no objection to it in your pleadings, you plead the general issue, and then you give notice which reads as follows:

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"'Please take notice that the defendant will give in evidence and insist under the general issue that the car load of wheat in question was purchased September 20th for shipment on or before ten days from date; that it was not so delivered and notice of cancellation was given by telephone; that the new agreement was made by which the said car load of grain was consigned to the defendant to be handled for the account of plaintiff; that defendant is not liable to plaintiff in any sum or amount except on the sale of said grain and then only if he can realize on said sale less usual commission charge.'

"Now I assume that the declaration and your pleadings frame an issue to this effect as to whether or not you received that car by virtue of the original contract or whether you now have it or hold it by virtue of a new agreement. Now that is all there is to this law suit as I see it. Am I right? You received it, you accepted 1,221 bushels and 40 pounds of wheat.

"*Mr. Cleland:* Yes—

"*The Court:* Either upon the original terms or commission basis. Now that is the issue, is it not?

"*Mr. Cleland:* Yes. If accepted upon the commission basis you understand. Our contention is we didn't accept it as a purchase.

"*The Court:* I understand.

"*Mr. Cleland:* We sold it for the best price obtainable and settled with them on the price received.

"*The Court:* Yes. That is the question to go before this jury. * * *

"*Mr. Cleland:* When we sent him a written confirmation which if it wasn't satisfactory shouldn't have been accepted.

"*The Court:* You admit receiving 1,221 2/3 bushels grain, don't you. You got possession of it by virtue of the original contract or you got possession of it on a commission basis haven't you, one or the other?

"*Mr. Cleland:* Sure."

Later counsel was allowed to show that in the grain and milling business "Time shipment, prompt" meant ten days and plaintiff gave testimony to that effect.

Counsel devotes a good deal of space in the brief in arguing assignments of errors in relation to not allowing the jury to pass upon the effect of the custom in

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the trade, and whether the shipment should have been made in ten days, and the plaintiff's testimony that the grain was to be shipped as soon as a car could be obtained, that the car was spotted October 5th, that it was promptly loaded, and on October 9th was started on its destination, and a bill of lading sent to defendant.

The record shows that the bill of lading was received by the defendant, and the car re-consigned by the defendant to Baltimore, Maryland, for the export trade.

Testimony was also given to the effect that plaintiff and farmers generally had no knowledge that "prompt shipment" meant in ten days.

The judge finally charged the jury:

"It is conceded by both parties that a car of wheat was loaded, put on the track on the 9th day of October, 1920; that the original transaction was entered into by virtue of a telephone conversation on the 20th day of September and the confirmation I believe bears date as of that date, and received by the plaintiff in this case at a subsequent date, it is immaterial when.

"I charge you as a proposition of law that that contract remained in full force and effect regardless of the wording thereof until such time as the defendant in this case cancelled it. There is no testimony in this case that he undertook to cancel it until some time during the 9th day of October, 1920.

"I charge you that as a proposition of law that when the delivery was made of the wheat to the railroad company it was in compliance with the contract if the contract still remained in force, and the delivery of the wheat to the railroad company passed the title to the defendants. * * *

"Now it is the theory of the plaintiff that all of this contract was carried out; that the wheat was delivered prior to any cancelling or any attempt to cancel or any conversation having occurred between the parties subsequent to the making of the contract and the receipt of the confirmation.

"Now it is the theory of the defendant that on

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that day * * * in a telephone conversation they entered into what is known as a substituted agreement.

"Having charged you as a proposition of law that they could not cancel after the delivery to the railroad company, but it is the theory of the defendant that they had a telephone conversation whereby he said to the seller, the plaintiff herein, Mr. Grimshaw, that he would have to cancel it, that he would cancel it, that he wouldn't receive the grain except upon a commission basis, to which expressly and by implication the plaintiff herein agreed to, and therefore it is the theory of the defendant that they received the grain by virtue of a substituted agreement upon a commission basis.

"Now gentlemen, that is the only fact that remains for you to find. * * * If you find that there was no substituted agreement, I instruct you that it would be your duty to return a verdict here in favor of the plaintiff. * * *

"*The Court:* So, if there was no substituted agreement your verdict would be in favor of the plaintiff and the form of your verdict would be, 'We find in favor of the plaintiff and assess his damages at the sum of $2,907.56.'

"If, on the other hand, you find it to be a fact from the evidence in the case, that they have possession of it by virtue of a substituted agreement to handle it upon a commission basis, in that case the form of your verdict would be, 'No cause of action.'"

The judge was right in holding that the issue was a very simple one, to-wit, Was the wheat shipped and received under the original contract, or was it, as defendant claimed, received under a substituted agreement? In that regard the testimony was in sharp conflict. The judge submitted that question to the jury under a fair charge, and the jury found in favor of the contention of the plaintiff.

The judgment is affirmed, with costs to the appellee.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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PEOPLE *v.* LE BEAU.

CRIMINAL LAW—VENUE—EVIDENCE.

In a prosecution for larceny by trick, conviction cannot be sustained where the record fails to locate the place of the crime within the jurisdiction of the trial court.

Error to recorder's court of Detroit; Heston (William M.), J. Submitted January 13, 1922. (Docket No. 155.) Decided March 30, 1922.

George LeBeau was convicted of larceny, and sentenced to imprisonment for not less than 1 nor more than 5 years in the Detroit house of correction. Reversed.

Edward N. Barnard, for appellant.

Merlin Wiley, Attorney General, *Paul W. Voorhies,* Prosecuting Attorney, and *Harry S. Toy,* Assistant Prosecuting Attorney, for the people.

MOORE, J. The information in this case contains two counts, one for larceny of the sum of $600, and the other for receiving stolen property of like value. The theory of the people was that the defendant was guilty of the crime of "larceny by trick." The claim is that Octavian Ramba, son of Mary Ramba, was arrested charged with making whisky, that Mary Ramba gave to the defendant the sum of $1,500 to obtain Octavian's release from jail; that of this sum, $100 was paid to a Mrs. Alexander, who acted as interpreter, and to the defendant, for their services, $800 to the internal revenue collector as a tax, leaving $600 in the defendant's hands which sum the people allege he feloniously retained.

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Mr. LeBeau positively denied receiving from Mary Ramba any sum or sums in excess of $800 which was given him in front of Mary Ramba's residence; that of the $100 paid to Marie Alexander as consideration for their respective services, he received $50, and the $800 was paid by him to the collector of internal revenue, for which a receipt given by the collector was produced. The case was submitted to the jury upon both counts of the information, and defendant was convicted of the crime of larceny by "trick" of property of the value of $600. A motion for a new trial was denied.

Counsel discusses two questions:

(1) Was the verdict of the jury so contrary to the great weight of the evidence as to constrain the court to set it aside and grant a new trial?

(2) Does the record disclose any competent proof of the venue, viz.: that the crime alleged was committed in the city of Detroit, Michigan, and within the jurisdiction of the recorder's court?

When the case was first presented in this court counsel for the people stated if they were allowed to get a supplemental return that they thought they might supply the testimony which would show the offense was committed in the city of Detroit. The supplemental return is here. Unfortunately it does not show the desired testimony.

It is well settled that in criminal trials a conviction cannot be sustained where the record fails to locate the place of the crime within the jurisdiction of the court. *People* v. *Ayres*, 182 Mich. 241, 246; *People* v. *Warner*, 201 Mich. 547, 554; *People* v. *Jackzo*, 206 Mich. 183, 192, 193.

In *People* v. *Ayres*, *supra*, the court, speaking through Justice STEERE, said:

"The rule is elementary that in criminal trials the venue must be proved by competent evidence beyond a reasonable doubt, and where the record fails to lo-

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cate the place of the crime within the jurisdiction of the court, whether through inadvertence or otherwise, the judgment must be reversed (citing many cases)."

The judgment is reversed, and a new trial ordered.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

JOHN WIDDICOMB CO. *v.* CARD.

1. TAXATION—DECREE OF SALE—VALIDITY—STATUTES.
   The decree of the court below for the sale of lands for taxes on petition of the auditor general was void under section 66, Act No. 206, Pub. Acts 1893, where the court remained in session only four days after the hearing of the petition and the entry of the decree.

2. SAME—ADVERSE POSSESSION—STATUTE OF LIMITATIONS.
   Where neither plaintiff nor any grantor in the tax title chain entered into actual possession of land under a void tax deed, the payment of the taxes for subsequent years gave it no title by adverse possession under either the five-year or ten-year statutes of limitations (1 Comp. Laws 1915, § 4070, 3 Comp. Laws 1915, § 12311, subd. 2).

Appeal from Delta; Flannigan (Richard C.), J. Submitted January 24, 1922. (Docket No. 125.) Decided March 30, 1922.

Bill by John Widdicomb Company against William F. Card and others to quiet title to land. From a decree dismissing the bill, plaintiff appeals. Affirmed.

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Colin P. Campbell, for plaintiff.

H. J. Rushton, for defendants.

MOORE, J. The learned trial judge stated the questions involved in this litigation so clearly that we quote from his opinion as follows:

"This is a bill to quiet title. The land involved is situated in Delta county, is described as the east half of the southeast quarter of section 2, in township 43 north of range 19 west, and is said to be worth about $200. As originally filed the bill claimed title in the plaintiff under a tax deed issued by the auditor general, upon a sale of the land for taxes in 1895, pursuant to a decree of this court, but by amendment of the bill the government title is also claimed.

"The tax title is void. Upon the filing of the auditor general's petition the usual order of hearing was made and entered. The day appointed for the hearing was October 22, 1895, which was the first day of the term. The matter of the petition was heard and the decree was made and entered that day. The court remained in session on the 23d, 24th, 25th, and 26th days of October, when it adjourned *sine die*. It was in session but four days after the day appointed for the hearing and for that reason the decree was void as were all sales made under it. *Peninsular Savings Bank* v. *Ward*, 118 Mich. 87; *McGinley* v. *Mining Co.*, 121 Mich. 88.

"The tax deed was duly recorded and the taxes levied on the property for the year 1895 and all subsequent years down to the present, were paid by the plaintiff or by its predecessors in the tax-title chain, and the further position of plaintiff's counsel is, that the record of the tax deed and the payment of the taxes entitled it to invoke both the five-year (1 Comp. Laws 1915, § 4070) and the ten-year (3 Comp. Laws 1915, § 12311, subd. 2), statutes of limitation. Neither the plaintiff or any grantor in the tax title chain, entered into actual possession under the tax deed or otherwise. It is conceded the property has been vacant and unoccupied since 1899. The benefit of the five-year statute of limitations is by its terms limited to those who enter under a tax deed and remain in

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'actual and undisputed possession' for the five-year period. Actual entry is also necessary to set in motion the ten-year statute and to create a bar under that statute an actual, continued, visible, notorious, distinct and hostile possession under the tax deed for ten years, must be shown. *Yelverton* v. *Steele*, 40 Mich. 538; *Sparrow* v. *Hovey*, 44 Mich. 63.

"At the sale of 1895 the property was bid to the State. The State bid was sold and the land deeded by the auditor general in the chain of titles to the plaintiff on October 11, 1897, which was after Act No. 229, Pub. Acts 1897, providing for service by the tax purchaser of notice to redeem, took effect. The service of a notice to redeem was not shown and is not claimed. If there had been actual entry under the tax deed followed by adverse possession for five years or ten years, the rights of the owner of the government title would not be cut off by either the five or ten year statute of limitations in the absence of a notice to redeem. *Cook Land, etc., Co.* v. *McDonald*, 155 Mich. 175; *Holmes* v. *Soule*, 180 Mich. 526. That there was any entry or occupancy sufficient to set in motion the fifteen-year statute of limitation is not asserted by the plaintiff.

"The controversy regarding the ownership of the government title arises in this way. The land was patented to the defendant Card under the homestead laws of the United States. The patent was issued March 2, 1892, and was recorded on May 12th of that year. About six years before he obtained his patent, and on April 13, 1886, Card deeded with full covenants of warranty, to one Edwin R. Burrows, now dead. He was the husband of the defendant, Clarinda C., and the father of the defendants, Enola R. and Ferry P. Burrows, who now claim the title under the Card deed to the husband and father. The Burrows deed was recorded in Delta county on May 26, 1886. On the day the patent to Card was recorded (May 12, 1892), he mortgaged the property to one Gamble. Under foreclosure of the mortgage, the regularity of which is unquestioned, the property was deeded to Gamble who later deeded in the chain of title to the plaintiff. It appears that Card was living on an adjoining 80-acre tract and inferentially claiming the land in question as

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included in his homestead entry, in August, 1887. But that he made his homestead entry, or that he was in actual occupancy, as a trespasser or otherwise, of the land in question, or even of the adjoining 80, in April, 1886. when he deeded to Burrows, does not appear. When Gamble loaned his money and took his mortgage Card was in actual possession. Gamble did not have actual notice of the deed to Burrows and did not have notice or knowledge of any fact or circumstances calculated to awaken in him, or in any person of ordinary prudence, a suspicion that Burrows had or claimed any right, title or interest in the land through or under Card or otherwise. And so the question is presented whether, because of the record thereof, a subsequent purchaser is chargeable with constructive notice of a warranty deed executed by his grantor when he was not in possession and at a time when he had no right, title or interest whatsoever, legal or equitable, in the land so deeded.

"That the record of a deed or mortgage by the holder of an equitable title in possession, is constructive notice to a subsequent purchaser from the common grantor, is the Michigan rule. *Edwards* v. *McKernan*, 55 Mich. 520; *Balen* v. *Mercier*, 75 Mich. 42. But the question arising under the facts of this case was not involved in those cases and seems not to have been decided in this State.

"While the opposite is held by important courts (*Ford* v. *Unity Church*, 23 L. R. A. 561. and cases in note [120 Mo. 498, 25 S. W. 394]), it is thought reasonable and more in accord with the common understanding of the effect of our recording laws. to hold subsequent purchasers to constructive notice of all recorded instruments affecting the title to the lands purchased which were executed by the common grantor before the acquisition of the legal title, whether, when he executed the prior conveyance or incumbrance, he was possessed of an equitable title or not, or was in actual occupancy or not. *Bernardy* v. *Mortgage Co.*, 17 S. D. 637 (98 N. W. 166, 106 Am. St. Rep. 791); *Warburton* v. *Mattox*, Morris (Iowa), 367. Whether there is on record a deed or mortgage executed by the common grantor is information easily obtained by a subsequent purchaser. It is needful only that he in-

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spect the index book which the register of deeds is required by law to keep and does keep. To require a subsequent purchaser to do what every prudent purchaser does is no hardship. The prior purchaser or mortgagee who, notwithstanding his grantor or mortgagor is not in possession and has no title of record, may be, as he commonly is, a good faith purchaser for a valuable consideration, has done all that he can do for his own protection and for the protection of subsequent purchasers, when he places his instrument on record and it is neither unjust or unreasonable to insist that, for his own protection the subsequent purchaser be at the very mild trouble, inconvenience or expense attending an inspection of the index book in the office of the register of deeds.

"The deed from Card to Burrows was also signed by Mrs. Card but it was not acknowledged by her and there was but one witness to her signature. The deed was duly acknowledged by Card and to his signature there were two witnesses. The point is made that because the execution by Mrs. Card was not properly witnessed and acknowledged, the deed was not entitled to record and therefore did not operate as constructive notice. That an instrument not executed so as to entitle it to record is not constructive notice to anyone is elementary. But where an instrument is executed by two or more persons but by one only in the manner and form required by the recording laws, it is constructive notice of the conveyance by the person who properly executed it but not of a conveyance by the other or others. *Hall* v. *Redson*, 10 Mich. 21; *Rayner* v. *Lee*, 20 Mich. 384. The record of the deed to Burrows was constructive notice of the conveyance by Card and what he had conveyed to Burrows was what he attempted to mortgage to Gamble. The mortgage which describes Card as a widower was executed by him alone.

"In the event a decree quieting title in the plaintiff is refused, a decree is asked requiring the defendants to repay the plaintiff the amounts paid for the State bid and for taxes, aggregating about sixty dollars. While it is proper in certain cases, where the owner of the government title applies to a court of equity for the relief of his title from the cloud of a void tax

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deed to require, as a condition of the granting of such relief, the repayment of taxes, the jurisdiction of equity to decree such repayment against a defendant who is not before the court seeking any form of affirmative relief, is not apparent.

"The bill will be dismissed but without prejudice to any remedy the plaintiff may have at law, for the recovery of the taxes paid. The defendants will recover their costs to be taxed."

The first claim of appellant requiring our attention is that the tax sale of 1895 is valid. Counsel concedes that the following cases seem to support the opinion of the circuit judge: *Peninsular Savings Bank* v. *Ward,* 118 Mich. 87; *Youngs* v. *Clark,* 120 Mich. 528; *Wait* v. *McMillan,* 121 Mich. 95; *Aztec Copper Co.* v. *Auditor General,* 128 Mich. 615; *Platz* v. *Englehardt,* 138 Mich. 485.

We now quote from the brief:

"It is plaintiff's contention that the decision in the case of *Peninsular Savings Bank* v. *Ward,* which the other decisions follow without any discussion or consideration of the questions involved, was brought about by misapprehension on the part of counsel and the leading of the court, because of this misapprehension, into an erroneous conclusion as to the language and interpretation of the statute in question. The *Ward Case* was decided upon the assumption that the statute requires the court to be in session for at least six days. * * *

"We here attack that decision and the cases following it not because the decision was not correct upon the premise upon which it was based but because that premise was a false one imposed upon the court by the erroneous assumption of counsel as to the construction of the statute, and our contention is that the statute is not susceptible properly and particularly in view of later decisions of the court, of the accepted construction in that case and the one contended for in this."

Counsel cites *Wolverine Land Co.* v. *Davis,* 141 Mich. 187; *Goodell* v. *Auditor General,* 143 Mich. 240 (114

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Am. St. Rep. 646), and quotes at length from the last named case. A reference to these cases will show that they are in harmony with *Peninsular Savings Bank* v. *Ward, supra,* and with the contention of the chancellor in the instant case in his construction of the statute.

Another claim of counsel requiring our consideration is stated by counsel as follows:

"We rely in this case on the five-year statute (1 Comp. Laws 1897, § 3896 [1 Comp. Laws 1915, § 4070]), and the ten-year statute of limitations (Act No. 314, Pub. Acts 1915, chap. 9, § 1 [3 Comp. Laws 1915, § 12311, subd. 2]). Plaintiff contends under the decisions reference to which will be made shortly, that the record of the auditor general's deed to McIver and Bosworth was a disseizin of the claimants under the government title and that the payment of taxes by the purchasers of a tax title continued for more than ten years, was a sufficient possession. The decisions on this point are: *Rayner* v. *Lee,* 20 Mich. 387, in which it was held that the payment of taxes by plaintiff or by someone in his chain of title is very significant of plaintiff's adverse possession, and *Murray* v. *Hudson,* 65 Mich. 670, holding that the recording of the tax deed is disseizin and paying taxes shows adverse possession."

Rayner v. *Lee* was decided in 1870 and the opinion states that in every year since 1842 some one under whom complainant claimed had assumed to be owner and had exercised public and notorious acts of ownership.

The case of *Murray* v. *Hudson, supra,* was an action of trespass tried before a jury which answered a special question reading as follows:

"Had Bryce and the Hudsons before the alleged trespass, open, visible, continuous, notorious possession of the land in question for ten years and upwards?
"*A.* Yes."

The court held in that case that the jury were properly instructed upon the subject of adverse possession

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and that there was evidence upon which to base their findings.

In the case before us the bill of complaint avers:

"Your orator further shows unto the court that said lands are vacant and unoccupied as your orator is informed, and have been so vacant since the year 1892; that no buildings or fences or other improvements have ever been made on said premises. * * * Your orator further shows unto the court that said premises are vacant, unoccupied timber land, and that the only possession taken or claimed by any person for 25 years and upwards has been an occasional visit to said lands by the predecessors in title of your orator."

We think the chancellor was right in his ruling upon the subject of adverse possession. The other contentions of counsel for the appellant have had our careful consideration, but will not be discussed.

The decree is affirmed with costs in favor of the appellees.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

BECKER *v.* LINCOLN BUILDING CO.

1. CONTRACTS—BUILDING CONTRACT — BREACH OF CONTRACT — EVIDENCE—SUFFICIENCY.

In a suit by the owners of a building against the contractor for an accounting and to enjoin interference with the completion of the building by the plaintiffs, evidence

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held, sufficient to sustain the finding of the court below that defendant breached the contract.

2. SAME—PROVISIONS OF BUILDING CODE MADE PART OF CONTRACT BINDING UPON PARTIES ALTHOUGH INVALID.

Where the provisions of a building code were made part of the contract the parties were bound thereby, and the fact that the code was afterwards declared unconstitutional is immaterial, since the parties by appropriate reference might make an invalid code or any other paper a part of the contract.

3. SAME—BREACH OF CONTRACT.

Where plaintiffs agreed to deed to defendant the lot upon which the building was to be erected by defendant, and then purchase it back on a contract, but the bank refused to loan defendant money on said deed after it was executed, holding it to be only a mortgage, and in accordance with a new agreement, and in order to enable defendant to borrow the necessary money, plaintiffs executed a mortgage to the bank for $5,000 with directions to pay the same from time to time to defendant, upon which it had received $3,000, it cannot be said that what was done by plaintiffs amounted to a breach of the contract, justifying defendant's refusal to complete the building.

Appeal from Wayne; Lamb (Fred S.), J., presiding. Submitted October 28, 1921. (Docket No. 124.) Decided March 30, 1922.

Bill by Anthony H. Becker and another against the Lincoln Building Company for an accounting, and to enjoin an interference with the completion of a building. Defendant filed a cross-bill asking affirmative relief. From a decree for plaintiffs, defendant appeals. Affirmed.

Hubert E. Hartman and *Stanford C. Wastell*, for plaintiffs.

Edmund E. Shepherd, for defendant.

MOORE, J. Plaintiffs were the owners of a lot in the city of Detroit. On the 29th day of May, 1919,

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they entered into a written contract, wherein defendant agreed to construct for plaintiffs, on the lot of the plaintiffs, a two-family flat, according to certain plans and specifications. The plaintiffs were to convey to defendant their title in such lot and the defendant was to construct the building, plaintiffs to pay a total sum of $14,500, $1,000 cash, a credit of $3,000 for the lot and the balance at the rate of $105 per month with interest, etc. On the same day the lot was deeded to defendant, a land contract for the re-conveyance of the land in the usual form was executed between the parties, and delivered to the plaintiffs. The building contract provided that defendant should proceed with the construction of said building with promptness. The contract further provided that if plaintiffs should fail to meet the payments, defendant was given the right to cancel the contract and recover for work done and materials furnished or continue the work and recover the contract price. If, on the other hand, defendant should not proceed and complete the building in accordance with such contract the plaintiffs might take over the building and finish it, holding defendant liable for any additional costs from the money due defendant when the entire job had been completed.

It is claimed the building was to be completed by August 1st, but there was no time limit in the written contract. In the meantime the plaintiffs had sold the house in which they were living at the time the contract was made, and agreed to give possession October 1st, and they got very impatient at the slowness with which the building progressed.

On or about the 1st day of October a controversy arose over the construction of waterproof floors in the bath rooms of said building which plaintiffs claimed were to be constructed under the terms of the contract and necessary in order to conform to the building code

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of the city of Detroit, and which defendant refused to construct, unless plaintiffs paid extra for such work and material. Correspondence passed between the parties, which we quote:

"October 1, 1919.

"Mr. ANTHONY H. BECKER,
"774 Leland Ave.,
"Detroit, Michigan.

"*Dear Sir: In re* two-family flat at lot 102, Dakota avenue.

"The city code requires that gas vents be installed in this building. The cost of this will be $25.

"The code also requires that waterproof floors be put in all bath rooms. A terrazzo floor will cost you $100 for each bath room, and cement floor $60 for each bath room.

"We are in receipt of your check for $7.50 covering the cost of surveying, and thank you very much for same.

"Please let us have your check for $225 if you wish a terrazzo floor in each bath room, or $145 if you wish us to have cement floor put in.

"Kindly give this matter your prompt attention, so as not to delay the progress of the building any more than is necessary.

"Yours very truly,
"LINCOLN BUILDING COMPANY.

"P. S. The above items are not covered in the specifications, and we must therefore ask that you send us your check to cover the additional expense involved."

"774 Leland St., Detroit, Mich., Oct. 11, 1919.

"LINCOLN BUILDING CO.,
"Detroit, Mich.

"*Gentlemen: Re* lot No. 104, Dakota Ave.

"Referring to your letter of October 1st in which you demand of us a payment of one hundred (100) dollars for putting in a waterproof floor in each bath room in the flat you are building for us.

"Notwithstanding our contract explicitly provides that you shall complete the building in all respects complying with the local ordinances and building code,

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although the same are not explicitly mentioned, we find ourselves at present in a position where we are compelled to pay your demand, because we have already made a contract to deliver our present residence, at a time already past, intending to move into this flat, and we are daily increasing our liability for failure to do so. We are accordingly paying you the two hundred (200) dollars demanded, not because of any recognition on our part, of any liability to you to make such payment, but because our situation forces us to do it, and we protest and shall insist that you are legally liable to us for the money so paid, as paid without consideration.

"Yours truly,
(Signed) "ANTHONY H. BECKER,
"MINNIE BECKER."

"3003 Woodward Avenue, Oct. 13, 1919.
"Mr. ANTHONY H. and MINNIE BECKER,
"774 Leland St.,
"Detroit, Michigan.

"*Dear Sir and Madam:* We have your favor of the 11th inst., handed to us on the same date by Mr. J. W. Farrington, together with check calling for $200, signed by E. A. Becker, and in reply will say that your communication does not state what kind of a waterproof floor you wish us to install in your two family flat at lot 104, Dakota avenue.

"If it is for terrazzo floor, we wish you would kindly mail us letter instructing us to proceed with this kind of a floor, and that the $200 check is sent to us in payment of the work to be done on the terrazzo floors in the bath rooms. We also wish you would state in your letter that the terrazzo floors are extra, not called for in the plans and specifications or contract, with no strings attached to the payment of the check to us, as you know as well as anyone that there is no terrazzo floor called for in either the plans or specifications.

"If you do not want to pay for extras you had better advise us at once and we will stop putting them in. You know as well as we do that it costs money to build in these days.

"The writer was also down to the bank this morning and learned from the manager of the mortgage de-

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partment that you had not left the deeds and contracts with him, as you promised you would do. This is to inform you that unless this is done at once, it is our intention to stop the work after this week on this building, after which time it will be necessary for you to pay us cash in full for all work, labor and material put into this job, and we will be compelled to insist that the money be paid for all work, labor and material before it is furnished in this job.

"Please be governed accordingly.

"Yours very truly,

"LINCOLN BUILDING COMPANY,
President."

"(Letter Head Rood & Visscher.)
October 15, 1919.

"LINCOLN BUILDING CO.,
"Detroit, Michigan.

"*Gentlemen:* We are writing you at the request of Anthony Becker and Minnie Becker, in reply to your letter of October 13, 1919, addressed to them, in which you acknowledge receipt of two hundred (200) dollars, paid under protest to induce you to complete the building of an apartment on lot 104, Dakota avenue, of this city, according to the plans and specifications and contract executed by you and them May 29, 1919.

"The exigency of Mr. and Mrs. Becker's situation is such that they are compelled to demand of you, and they do hereby demand of you, that you complete the said building according to the contract, putting in the floors in the bath rooms as directed by Mr. and Mrs. Becker.

"This is also written to notify you that unless you immediately signify your intention to fulfill the contract in all respects at once they will immediately proceed to complete it themselves at your expense, as they have a right to do under your contract.

"This is also written to demand of you the return of the two hundred dollars paid under protest as above stated.

"Yours truly,

"ROOD & VISSCHER,
(Signed) "By John R. Rood.

"J.R.R./W."

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"3003 Woodward Avenue, October 15, 1919.
"JOHN R. ROOD, Esq.,
"637 Dime Bank Bldg.,
"Detroit, Michigan.

"*Dear Sir: Re* two family flat at lot 104, Dakota.

"This is to acknowledge receipt of your valued favor of October 15th. We are inclosing herewith copy of letter written to Mr. Becker today.

"We wish to advise that the second paragraph of your letter is not clear to us. When you advise that they demand us to put in the floors in the bath rooms as directed by Mr. and Mrs. Becker, we believe you are aware of the fact that this is not in accordance with the contract.

"This is also to advise you that they have in their possession a certain warranty deed and land contract which belongs to us, and which we are compelled to demand, and we do demand that they be turned over to us without delay, before they have carried out a part of the contract.

"The two hundred dollars referred to in your letter was paid to us for putting in terrazzo floors, and it was so noted on the back of the check. If they do not wish terrazzo floors put in the bath rooms we will return the money.

"Yours truly,
"LINCOLN BUILDING COMPANY,
By, "

"(Letter Head Lincoln Building Company)
"October 15, 1919.

"Mr. A. H. BECKER,
"774 Leland St
"Detroit, Michigan.

"*Dear Sir:* This is to acknowledge receipt of letter dated October 15, 1919, from Rood & Visscher, attorneys-at-law, handed to us by Mr. J. W. Farrington, in presence of Mrs. Minnie Becker, which was in answer to our communication of October 13, 1919.

"Upon receipt of the above letter from your attorney we telephoned the Peninsular State Bank, and were advised that the warranty deed and land contract, deeding the lot over to us, and the sale of the lot and completed building to you had not been turned over to them. When the deed and contract is turned over

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to the bank you will have carried out a part of the contract.

"However, in addition to this, we must also demand payment for all extras furnished on this job, either where material was furnished in excess of the contract price, or where labor was furnished in excess of the contract price. If you will advise us of your intention to do this, we will mail you itemized statement of all material and labor furnished on the building in excess of the contract price. You know as well as we do that the contract does not state that extras are to be furnished gratis, and we thought you understood the contract well enough to know that you would have to pay for them when put in under instructions to us received from you.

"Regarding the check for two hundred (200) dollars which your attorney demands of us to return to you, wish to advise that our letter of October 13th stated under what conditions we accepted this check.

"Kindly let us have your prompt and definite advices regarding these matters, and oblige.

"LINCOLN BUILDING COMPANY,
By....., President."

The parties did not get together and on October 16, 1919, plaintiffs filed the bill of complaint in this cause asking that defendant be decreed to pay the $200 alleged to have been wrongfully extorted from plaintiffs; that the defendant come to an accounting with plaintiffs for the several breaches of the contract alleged to have been committed by defendant, and for damages; that plaintiffs have credit on their land contract for the costs and expense to which they would be put in completing the building, and praying for an injunction restraining defendant from interfering with plaintiffs' completion of the building. A preliminary injunction was issued in conformance with plaintiffs' prayer and the plaintiffs proceeded to take over the job and finish the work at plaintiffs' expense, the defendant continuing on the job for about a week but not paying the men, and finally abandoning it on the

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25th day of October, 1919, by giving the plaintiffs notice in writing that nothing further would be done in the construction of the building by the defendant and refusing to pay men employed on the construction of the building.

Defendant filed its answer and denied all allegations of wrong doing, and thereafter filed its supplemental answer and cross-bill, averring that the terms and conditions of said agreement providing for the conveyance by deed to defendant of the lot owned by plaintiffs were not complied with, and that plaintiffs neglected and failed to execute and deliver said deed and otherwise breached the building contract, causing defendant to notify plaintiffs in writing of their decision to rescind the said contract. Defendant further alleges that it did proceed to complete the erection of the building with due diligence, but that the plaintiffs so interfered with the orderly progress of the performance of the work that they breached the spirit of the building contract, by insisting on the installation of items of labor and material not contemplated in the contract. The cross-bill asked for affirmative relief. A hearing was had in open court. The court found for the plaintiffs on their bill of complaint and against the defendant on its answer and cross-bill, and a decree was signed accordingly. The case is brought into this court by appeal.

Stated briefly it is the claim of defendant:

(1) That it did not breach its contract.

(2) That the building code offered in evidence was improperly received for two reasons. (*a*) It was not the "building code" contemplated by the parties when the contract was signed. (*b*) The building code offered in evidence has been held by this court to be unconstitutional, counsel citing *Thompson Scenic Railway Co.* v. *McCabe*, 211 Mich. 133.

The third contention is that plaintiffs breached the contract.

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1. Is there testimony that defendant breached the contract as the chancellor found? We have already quoted the correspondence. We now quote from the testimony of Mr. Farrington, who was hired by the plaintiffs with the consent of defendant to see if the work could not be expedited.

"Things went along pleasantly for awhile, for a little time, until the matter of the bath room floors came up—the city code. It was a matter of waterproof floors being put into the bath rooms. Mr. Scheurman would not have them put in. I don't remember the date they refused to proceed. * * * I talked with Mr. Scheurman, F. T., president. I told him that the vent was plainly on the plans and that as it was it was a joke, and with reference to the floor that he had promised that he would put in a terrazzo floor, and he said he had promised to do it and he knew that a waterproof floor had to go in, but he had changed his mind and would not put it in. * * * I was present at conferences during which the matter of the bath room floor was discussed between Mr. Scheurman and Mrs. Becker. I think the first was when Mrs. Becker and Mrs. Appel and myself went to Mr. Scheurman. I don't remember the date. I think that was probably a week or less before the letter was written by Mr. Rood. I think about a week or less. That would be about the 7th or 8th of October. Mrs. Becker offered, or tried to negotiate with Mr. Scheurman about putting it in. Mr. Scheurman repeated that he had agreed to put in the floor, but he had changed his plans. He gave no reason for that change. She asked him, please to do this work and he replied that he would when he had time if she would pay this $200, as demanded by him. After that I don't remember what was done. He said that he would put in the terrazzo floor for $200. After that, Mr. Rood was consulted.

"I was present at the time when Mrs. Becker got the note of protest to Mr. Scheurman. I was there with Mrs. Becker. After reading the letter, Mr. Scheurman said that he would not do the work, that he would refuse to continue. He said that he refused to continue the work.

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"*Q.* He did not refuse only to put in the floors?

"*A.* According to the letter he had written, which called for Mr. Rood's letter. After Mr. Scheurman said that he would not do the work, I said we will proceed with the work according to the contract at your expense. He said, go ahead, I will not."

There was other testimony to the same effect, which taken in connection with the correspondence shows a breach of the contract on the part of the defendant.

2. Was the building code improperly introduced in evidence? (*a*) It is claimed the code which was introduced in evidence was not approved by the commissioner of buildings until July 1, 1919, while the contract was made in May of that year. We do not regard it as very material whether the proper code was introduced in evidence or not.

Mr. Farrington testified without objection:

"I am acquainted with the provisions of the code. It provides any kind of waterproof floors. He wanted $100 extra for putting in those floors for each bath room."

The defendant knew what the code was for in its letter of October 1st it is written:

"The city code requires that gas vents be installed in this building. The cost of this will be $25. The code also requires that waterproof floors be put in all bath rooms. A terrazzo floor will cost you $100 for each bath room, and cement floor $60 for each bath room."

(*b*) The fact that the code was afterwards declared unconstitutional is not material. The contract might by appropriate reference make an invalid code part of the contract just as it might make any other paper a part of the contract. The defendant did so make it. It knew its provisions and refused to comply with them. See *Martus* v. *Houck*, 39 Mich. 431 (33 Am. Rep. 409), and *Ginsberg* v. *Myers*, 215 Mich. 148.

3. Did the plaintiffs breach the contract so as to

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entitle the defendant to the affirmative relief it asks in its cross-bill? This contention is based upon the claim that, when defendant sought to borrow money at the bank, the bank officials declined to make the loan upon the theory that the deed from the plaintiffs to the defendant with the land contract back really constituted a first mortgage and it is claimed that an agreement was made that defendant would deed the land back to the plaintiffs who then would make a mortgage to the bank and after doing so could make a second deed to the defendant. There was talk to this effect, but defendant never deeded the land back to the plaintiffs, and they never made the second deed. What occurred was that the deed made by the plaintiffs to the defendant when the contract was made was left with the bank, and withheld by it from the registry, and the plaintiffs made a mortgage for $5,000 directly to the bank with instructions to pay the money from time to time to the defendant, and this was done so that when the trouble arose $3,000 had been paid to the defendant by the bank. This situation is shown by the cross-examination of the financial officer of the bank, which we quote in part as follows:

"*Q.* Was there any other difficulty about the title than the title that you did not want to have a loan made to a party who had the deed as security with a land contract back whereby you considered it a mortgage?

"*A.* Not as I had any knowledge of. That was the thing preliminary to our part of it.

"*Q.* But your whole trouble was that with a land contract back you regarded it as a mortgage?

"*A.* Yes. I wanted the loan to the person who had the real title. The Lincoln Building Company deeded the property back to the Beckers. They executed a deed so that the bank would make the mortgage.

"*Q.* Have you that deed here—don't you think that the fact is that you retained the original deed and insisted on having your mortgage put on record and retaining that deed so you had that deed in your files?

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"*A.* I rather think that is so now, but that was not my impression at the time, but I see from the file that is the case.

"*Q.* You kept the deed?

"*A.* Yes, the original deed by Mrs. Becker to the Lincoln Building Company, we kept.

"*Q.* Then no conveyance was made by the Lincoln Building Company to the Beckers?

"*A.* No, sir, not as far as I know.

"*Q.* You still have possession of the deed by the Beckers going to the Lincoln Building Company and by them surrendered to you?

"*A.* No, I don't see it.

"*Q.* You have it now, haven't you, in your files?

"*A.* Yes, May 20, 1919.

"*Q.* Exhibit 18.

"*A.* Yes."

The plaintiffs made the deed in the first instance as was provided in the contract and co-operated with defendant in its efforts to get financial aid from the bank.

A careful reading of this voluminous record satisfied us that the decree is right. It is affirmed, with costs to the plaintiffs.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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BRENNER *v.* FEINBURG.

SALES—TIME OF DELIVERY—REASONABLE TIME.

Where plaintiff purchased three car loads of newspapers on July 30th without specifying date of delivery, and the first car was shipped on September 28th, which was accepted by defendant and paid for on October 18th, when he inquired how soon the other two cars would be shipped, their shipment on October 26th and 29th respectively, *held*, to be within a reasonable time, in view of the correspondence between the parties.

Error to Berrien; White (Charles E.), J. Submitted January 6, 1922. (Docket No. 42.) Decided March 30, 1922.

Assumpsit by Herman Brenner against Abe Feinburg for breach of a contract for the sale of certain paper. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Burns & Hadsell, for appellant.

O'Hara & O'Hara, for appellee.

MOORE, J. The plaintiff brought this action claiming that he was entitled to a judgment for the difference between the market price of two car loads of newspaper, on or about September 1, 1920, $46.71 per ton, and the contract price of the same, $34 per ton. At the conclusion of all the testimony each party made a motion for a directed verdict. The court directed a verdict for defendant in the sum of $231.82, this being the difference between the contract price and the price defendant received for the paper after defendant claims plaintiff refused to receive it. From a

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judgment upon this verdict the case is brought here by writ of error.

There is very little dispute in the facts. The transaction rests almost wholly in correspondence. After some preliminary correspondence the plaintiff wrote defendant July 30, 1920:

"I hereby confirm purchase of three cars clean newspaper in bales and solid bdls. at $34.00 less 3% Kalamazoo frt. rate ship same to my order St. Joseph, Mich., and oblige."

On July 31st, defendant wrote plaintiff in substance that the sale was made for delivery at Kalamazoo; that he had trouble with the mills at St. Joseph and did not desire to ship to them.

"If you can use the material in Kalamazoo, please let me hear from you with shipping directions. Otherwise it will be necessary to cancel the order."

Two days later plaintiff wrote defendant assuring him there would be no trouble in shipping to St. Joseph.

"You can try them with one car first and hold up shipment of balance two cars until you hear from the first if you want to. I will guarantee myself that you won't have any trouble."

On August 3, 1920, defendant again wrote plaintiff he could not ship to St. Joseph. August 4, 1920, after a talk over the long distance telephone it was agreed the paper would be shipped to St. Joseph. September 3d, plaintiff inquired in writing of defendant:

"How soon can I expect a car of newspaper from you the mill is getting anxious about it and oblige."

On the 16th day of September, 1920, the plaintiff wrote the defendant:

"In reference to three cars of newspaper due me as per our contract must have shipment on same in next few days—or will be obliged to go out on open market

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for same and charge difference to your account—as mill is very strong after me. Trusting I will not be forced to do this, I remain."

On the 18th day of September, 1920, the defendant wrote in answer to the above letter:

"Wish to say that shipment of one car will be made next week, and the balance will follow immediately."

On the 28th day of September, 1920, the defendant shipped to the plaintiff one car load billed to St. Joseph, Michigan, and that said car load arrived in St. Joseph on October 1, 1920, where it was accepted.

On the 18th day of October, 1920, the plaintiff wrote the defendant:

"Enclosed please find check for $337.32 in payment in full for car newspaper shipped to my order St. Joseph, Mich. Hoping you will find same satisfactory. * * * How soon can I expect the two cars of newspaper due me on order yet hope you will ship same at once the mill is liable to cancel the order on me and oblige."

The next day the defendant wrote the plaintiff: "The newspaper due you will go forward shortly." On October 26th the defendant telegraphed plaintiff:

"Shipping car ten three seven three N. K. P. loaded with newspaper. Invoice will follow when railroad rates are obtained."

No answer was made to this telegram. The car of newspaper referred to in the telegram arrived in St. Joseph, consigned to the order of the plaintiff, on October 29, 1920. Defendant's proof shows that he had to pay $40 a ton for the newspapers shipped to plaintiff in this car and plaintiff's proof did not contradict this.

On October 29, 1920, the plaintiff wrote defendant:

"I just received wire from the mill in reference to the last car of newspaper shipped to me that they refused to take in the car only on the market price upon

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arrival. If same is satisfactory to you kindly advise me at once. Also on next car on same basis."

On October 29, 1920, defendant shipped the third car, which arrived in St. Joseph on November 1, 1920, consigned to the order of the plaintiff.

On the 1st day of November, 1920, the plaintiff wired the defendant:

"Mill refused to take newspapers unless price reduced market worth day arrival. Wire disposition."

The plaintiff refused to accept the last two cars for the reason that the market broke to $25 per ton while the cars were in transit, but he claims he had the right to refuse them because of the delay. The defendant sold the two car loads which were refused by the plaintiff at the market price of newspaper on November 1, 1920, for $25 a ton. The market price of newspaper at St. Joseph, Michigan, from August 1, 1920, until October 29, 1920, was $46.71 per ton, including freight charges on same.

It was claimed by plaintiff in his testimony that there is a general custom between sellers and buyers in transactions identical with the one in controversy, which fixes the time limit for delivery of goods bought, when no definite time for delivery is set, at 30 days from the date of the making of the contract of sale, or of the giving of the order for the purchase of the same, but defendant and a paper manufacturer who was a witness for plaintiff, testified that they knew of no such custom, but the latter could not swear that no such custom existed. No time for delivery of any of this newspaper was specified in the contract except as indicated by the correspondence.

The position of defendant in this case is stated by counsel as follows:

"(1) There was no time specified for delivery in this contract and defendant was required only to make delivery within a reasonable time, and the correspond-

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ence between the parties and acts and conduct of plaintiff conclusively established that delivery was made within a reasonable time and that any delay was waived by plaintiff.

"(2) There was a delivery to plaintiff by defendant prior to any attempt on the part of plaintiff to rescind the contract.

"(3) The refusal of plaintiff to accept the last two cars of paper constituted a breach of the contract by plaintiff, resulting in a loss to defendant, for which he was entitled to recover in this action."

Plaintiff insists that he was, under the undisputed facts, entitled to a judgment for the difference between the market price of two car loads of newspaper, on or about September 1, 1920, or $46.71 per ton, and the contract price of the same, or $34 per ton; that even admitting the liability of the plaintiff for the non-acceptance of the last two car loads of newspaper, the trial court erred in allowing defendant damages on the actual weight of the said two car loads; that even admitting the liability of the plaintiff for the non-acceptance of the last two car loads, there should have been a verdict directed for the plaintiff for the difference between the damages he sustained and the damage sustained by the defendant. Each of these contentions is argued at length.

After reviewing the evidence at considerable length, the trial judge expressed the opinion that

"Under these circumstances the court is bound to hold that the paper was shipped to the plaintiff within a reasonable time—in other words, that the correspondence between the parties and the conduct of the parties with reference to this transaction was such that the paper was shipped within a reasonable time, and it was the duty of this plaintiff to accept those two car loads of paper when they arrived in St. Joseph."

The correspondence we have quoted shows that on October 18th the plaintiff sent defendant a check for

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the first car load and inquired how soon he could expect the other two cars, and was promptly advised of the time and one car went forward only 8 days later, and 11 days later the last car was sent. We think the trial judge was justified in holding they went forward in reasonable time. This conclusion makes it unnecessary to discuss the assignments of error in detail.

The judgment is affirmed, with costs to the defendant.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

In re MINOCK'S ESTATE.

MINOCK *v.* UNION TRUST CO.

INSANE PERSONS—GUARDIAN AND WARD—ADJUDICATION OF COMPETENCY NECESSARY BEFORE RESTORATION OF PROPERTY.

Where plaintiff had been adjudged insane and a guardian appointed to manage his estate, an adjudication by the probate court that plaintiff is now sane does not entitle him to the custody of his property in the absence of an adjudication that he is competent to manage same (3 Comp. Laws 1915, § 13950).

Error to Wayne; Shepherd (Frank), J., presiding. Submitted January 3, 1922. (Docket No. 13.) Decided March 30, 1922.

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Petition by Albert Minock against the Union Trust Company for the removal of defendant as guardian of the property of plaintiff. The petition was denied in the probate court, and plaintiff appealed to the circuit court. Petition dismissed. Plaintiff brings error. Affirmed.

Proctor K. Owens (*Moore & Moore*, of counsel), for appellant.

Campbell, Bulkley & Ledyard (*Charles H. L'Hommedieu* of counsel), for appellee.

MOORE, J. Mr. Minock was adjudged insane in August, 1908, and a petition was filed by Julia Minock, appellant's wife, praying that a guardian be appointed for appellant as a mentally incompetent person. Edward Minock, a nephew, was appointed guardian. He served until June 27, 1918, when he resigned, and soon after the Union Trust Company was appointed guardian. Mr. Minock is possessed of a very considerable estate, and this proceeding is an effort to the end that he be put in possession and management of the estate. It began in the probate court. An appeal was taken to the circuit court, and the case is brought into this court by writ of error.

The petition of Mr. Minock reads in part:

"That your petitioner subsequent to being placed under guardianship of the Union Trust Company, by an order of this court, has come into possession of all of his reasoning faculties, and is mentally capable and able of taking care of his affairs and property.

"That on the 3d day of August, 1920, your petitioner filed a petition in this court praying this court to adjudicate him sane; that the matter was brought on before the Hon. Edgar O. Durfee for hearing on the 5th day of November, 1920, and upon hearing the proofs in the case the court adjudicated your petitioner sane, as is evidenced by a copy of the order attached hereto and made a part hereof. * * *

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"Therefore your petitioner prays:

"(*a*) That the Union Trust Company, guardian of your petitioner, be discharged as such guardian, and your petitioner be released from guardianship and restored to all his legal rights.

"(*b*) That this court make an order turning over to your petitioner all of his property, moneys, mortgages, notes and securities accounted for by the Union Trust Company, as guardian of your petitioner."

It will be observed that the petition does not suggest that Judge Durfee had adjudicated that plaintiff was competent to manage his property, and as a matter of fact the record does not show that, since the plaintiff was found to be incompetent to manage his property, any order has ever been made that he is now competent to manage his property.

Many questions are discussed by counsel, but in our view of the case it is not necessary to discuss them though they have all been considered.

Counsel for plaintiff seems to proceed upon the theory that, because an order has been entered that Mr. Minock is now sane, it must follow that the management of his property must be turned over to him as of course. We think this position is not tenable. It is due a guardian that, before it is required to turn over the large estate in its hands as guardian of an incompetent person, a hearing should be had upon the question of his competency, and an order made by the proper court adjudging the ward to be competent. This has not been done, and we think the judgment of the circuit judge should be affirmed. See section 13950, 3 Comp. Laws 1915; *Henderson* v. *Henderson*, 206 Mich. at p. 47 *et seq.*

Judgment is affirmed, with costs to the defendant.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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YARINGTON *v.* HUCK.

1. NEGLIGENCE—PERSONAL INJURIES—EVIDENCE—SUFFICIENCY.
In an action for personal injuries due to a fall, alleged to have been caused by a hole in a rug in defendant's public place of business, evidence of defendant's negligence, *held*, sufficient to present a question for the jury.

2. APPEAL AND ERROR—HUSBAND AND WIFE—DAMAGES—TRIAL—INSTRUCTIONS—HARMLESS ERROR.
Although the trial court erroneously instructed the jury that they could allow plaintiff, a married woman, damages for interference with her household duties, where no such claim was made by plaintiff, and the error is not reflected in the verdict, the case will not be reversed therefor.

Error to Wayne; Webster (Clyde I.), J. Submitted October 7, 1921. (Docket No. 62.) Decided March 30, 1922.

Case by Marietta Yarington against Otto Huck and others, copartners as Huck Brothers, for personal injuries. Judgment for plaintiff. Defendants bring error. Affirmed.

John H. Dohrman, for appellants.

Clarence P. Milligan, for appellee.

MOORE, J. The plaintiff, a married woman 65 years of age, in company with her husband and a niece, Esther Yarington, and a lady friend, Mrs. Young, both of Buffalo, on October 26, 1919, went to Westwood Inn, a public place, owned and operated by defendants, for a dinner, and it is her claim that after stepping over the threshold of the main door, she caught her

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foot in a hole in the matting or runner spread from the door sill to a cigar case, to prevent mud being carried into the dining room on rainy days. She fell and dislocated her shoulder and claims to have also hurt her hip in the fall. The defendants claim there was no defect in the rug. After the plaintiff put in her testimony, and again after all the testimony was in, the defendants asked for a directed verdict. The case was submitted to a jury which returned a verdict for $1,250. A motion for a new trial was made and overruled. The case is brought here by writ of error.

The important question is stated by counsel as follows:

"The defendants contend in this cause that there was no question of fact raised by the testimony, upon which the jury could find them guilty of negligence and that no inference or presumption of negligence did arise from the facts in evidence to warrant the court in charging as in paragraph 3, that they might find that defendants had either actual or constructive notice or knowledge of the existence of the defect and to predicate or base a verdict thereon." Citing *Holmes* v. *United Theatres Co.*, 186 Mich. 548.

It may be well to quote some of the testimony:

"We entered by the main door from the Michigan avenue side; the main entrance. I don't remember whether my niece opened the door or whether it stood open, and as I stepped in the door I caught my foot in a hole in the runner just inside the door. * * *

"It was between 2:30 and 3 o'clock in the afternoon when we got there. The accident occurred just as I stepped inside the door. I did not get a foot from the door. I just stepped inside, and got possibly two steps, was all. The door opens in and leads into a long corridor. You go right out of there into the dining room. It was quite light in there. I think it was my right foot that caught in the rug when I took the first step into the hall. I went in first, then Mrs. Young and the others.

"*Q.* And in falling now, did you—could you get your foot out of this hole in time to save yourself?

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"*A.* I had to kick my foot loose, when they went to get me up, I had to kick my foot loose.

"*Q.* From what?

"*A.* From this hole in the rug.

"*Q.* What kind of a looking hole was it, what did it look like to you, the appearance of it?

"*A.* Well, of course in the condition I was in, I did not take particular notice of that.

"*Q.* No?

"*A.* But I knew my foot was caught in the runner, and all I could say was, 'Oh that rug, that rug,' and when I said that they went and picked it right up off the floor and carried it away out of sight. * * * When I went out of the place the rug had been removed.

"*Q.* Well, you refer to it now as a rug, at least I have referred to it as a rug. Was it a rug, or was it one of those fiber runners?

"*A.* I should imagine it was one of those fiber runners. It was worn through the center. I should imagine it was a yard wide and it ran from the door to the show cases. * * *

"*Q.* Did you see the rug as it lay on the floor—was it lying on the floor there?

"*A.* I saw the rug—

"*Q.* Saw the rug?

"*A.* After I caught my foot in it.

"*Q.* After you caught your foot in it?

"*A.* Yes. * * *

"*Q.* Well, now, was it a matter of where you pushed this runner ahead of you and created what might be called a bulge, or a condition of the mat or the runner, that you pushed it ahead of you, was that the trouble, Mrs. Yarington?

"*A.* No, sir; no, sir; I stepped right in. It seemed to be perfectly smooth, and I stepped right in and caught my foot in the hole as I stepped inside of the door, caught my foot right in the hole of the runner.

"*Q.* Are you positive of that Mrs. Yarington?

"*A.* Yes, sir; yes, sir; yes, sir."

We quote briefly from the testimony of the niece:

"We went up on the veranda and my aunt entered the door first. I held it open for her from the rear.

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"*Q.* Yes?

"*A.* And she went in, she had taken about one step when her foot caught in this grass runner, grass matting that was across the floor, and as she fell she tried to untangle herself but could not, and her foot—or, her shoulder went against the show case, which was there and dislocated it, and she fell over, sort of on her back.

"*Q.* Now, what kind of a matting was this, or what kind of a strip was this that was there?

"*A.* Well, it was about 2½ feet wide, I should imagine, a strip that one would ordinarily use on a door—or on a—

"*Q.* Of what was it made, could you tell, or what did it look like?

"*A.* Well, grass matting, I should call it.

"*Mr. Dohrman:* A what?

"*A.* A grass matting, it was a Japanese matting, it was old and dirty, and I think it had red stripes in it. I cannot tell definitely.

"*Q.* Do you recall particularly the character of the goods it was made of?

"*A.* Yes, sir.

"*Q.* Now did you observe it, as to what its condition was with reference to whether there was a hole in it there?

"*A.* Yes, there was a hole, it was about 10 inches in diameter.

"*Q.* What?

"*A.* It was about 10 inches in diameter and very ragged around the edge—this hole was.

"*Q.* And state whether or not that is what caught the foot of your aunt?

"*A.* Yes, that is what caught the foot of my aunt.

"*Q.* And when that happened—now, just what—did you see her fall?

"*A.* Yes, sir."

There was similar testimony from two other witnesses. There was testimony on the part of the defendants that the rug was got in March and was used whenever it was muddy; that on many days 450 to 500 guests were fed at the inn, most of whom presumably passed over this rug.

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The accident, as we have already seen, happened the last of October. This testimony easily distinguishes the case from *Holmes* v. *United Theatres Co., supra.* The case is more like *Nephler* v. *Woodward,* 200 Mo. 179 (98 S. W. 488), where it was held in a case not nearly so favorable for the plaintiff as the instant one that the case was one for the jury.

A more serious question is presented by that part of the charge which reads:

"There has been no testimony of any aggravation of any prior condition of the plaintiff, so that you will not consider that, but only the pain and suffering, the interference with her duties, her household duties, up to the present time and for such further time as you believe the condition will continue, not to exceed in all a period of eleven years, that being by the mortality tables the expectancy of life of this plaintiff. * * *

"You will, of course, not use or exercise any sympathy or prejudice in arriving at your verdict, but if you find, under these statements of law that I have given you, that the plaintiff should recover, then you will award her, as I say, such a reasonable amount as you believe will fairly compensate her for the pain and suffering and the interference with her ordinary household and other duties for her expectancy in life."

Counsel says in relation to these quotations:

"That the court erred in charging the jury that they could award damages to plaintiff, a married woman, for interference with her household and other duties, probably needs no argument here. It was repeated and emphasized and did undoubtedly have an influence on, and was considered by the jury in reaching the amount of their verdict.

"Loss of services are recoverable by the husband in a separate action. *Berger* v. *Jacobs,* 21 Mich. 215, 219; *Tunnicliffe* v. *Railway Co.,* 102 Mich. 624, 628 (32 L. R. A. 142)."

In his motion for a rehearing counsel did not give this charge as one of the reasons. Counsel for appellee says:

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"It is finally claimed by appellants that the court charged that plaintiff, a married woman, could recover any damages due to interference with her household duties. This claim is more fanciful than real. No evidence was introduced in the case and no claim was made by the plaintiff for any such damages. Evidence was introduced in the case, showing the inability of the plaintiff to perform her duties after her accident, but such testimony was only introduced to prove the extent of her physical injury. It will be conceded that no argument was made to the jury on any such element."

An examination of the record will show there is a basis for this claim. Eighteen months had elapsed between the time of the accident and the trial. The testimony offered on the part of the plaintiff including an X-ray expert shows serious injuries which continued to the time of the trial. We think the quotations made from the charge should not have been given (*Berger* v. *Jacobs*, and *Tunnicliffe* v. *Railway Co.*, *supra*), but we are also satisfied that the error is not reflected in the verdict.

Judgment is affirmed, with costs to the appellee.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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GASTA *v.* FARMERS STATE SAVINGS BANK.

PAYMENT—RECEIPTS—EVIDENCE—BURDEN OF PROOF.

In a suit to enjoin the foreclosure of a mortgage, positive testimony by plaintiffs that payments represented by written receipts given to them by defendant were actually made, *held*, sufficient to sustain a decree in their favor; defendant failing to sustain the burden of proof to support its claim that one of the receipts given to plaintiffs included amounts represented by previous receipts.

Appeal from Bay; Houghton (Samuel G.), J. Submitted February 3, 1922. (Docket No. 39.) Decided March 30, 1922. Rehearing granted July 20, 1922.

Bill by Carl Gasta and another against the Farmers State Savings Bank to enjoin the foreclosure of a mortgage. From a decree for plaintiffs, defendant appeals. Affirmed.

Collins, Thompson, Otto & McGinnis, for plaintiffs.

Kinnane, Black & Leibrand, for defendant.

MOORE, J. On November 15, 1917, plaintiffs purchased from George W. Gleason and Lizzie J. Gleason, his wife, the land described in the bill of complaint, for the sum of $9,400, assuming as part of the purchase price two certain mortgages, one for $5,000, and one for $700, running to the defendant. It was understood by the plaintiffs that there was also $700 in interest on these mortgages that they had assumed. The date of the $700 mortgage was February 24, 1917. On December 10, 1917, the plaintiffs claim to have paid the sum of $350 to the defendant. On December 17th, $500, on December 28th, $350, and on December

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29th, $1,050, in all $2,250. Plaintiffs have receipts for these payments. On the 28th day of December, 1917, the mortgage for $700 was discharged by W. S. Fotheringham, cashier of defendant bank. The $5,000 mortgage was dated March 7, 1916, payable 3 years from date, with interest at the rate of 7 per cent. per annum, interest payable December 15, 1916, and annually thereafter. The $5,000 mortgage was assigned to the Agricultural Life Insurance Company on September 16, 1916, and by them assigned to the Michigan Live Stock Company on April 21, 1917, and re-assigned to the Agricultural Life Insurance Company on May 12, 1917, and assigned by the Agricultural Life Insurance Company back to the Farmers State Savings Bank on January 4, 1919. The Farmers State Savings Bank also retained an interest in this $5,000 mortgage at the time of the first assignment amounting to one per cent. of the interest payable by the grantors, the assignees taking the mortgage over upon a six per cent. basis, while it called for seven per cent. interest.

On the 20th day of December, 1918, plaintiffs tendered to Francis F. McGinnis, president of the Agricultural Life Insurance Company, the sum of $4,444.54 in full payment and discharge of said mortgage. Mr. McGinnis refused to accept the same and discharge the mortgage. On the same day a tender was made in legal tender to W. S. Fotheringham, cashier of the Farmers State Savings Bank in the same sum. The tender was computed upon the basis of the plaintiffs owing the sum of $4,150. The tender was refused. On December 27, 1918, a tender was made to Mr. Fotheringham of the sum of $306.93 as interest due up to said date, computed upon the basis of $4,150 being owed. On January 27, 1919, the Farmers State Savings Bank began the publication of a notice of mortgage sale of said property for unpaid interest.

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On the 31st day of March, 1919, one of the plaintiffs, Carl Gasta, learned of such publication, and upon April 1, 1919, the plaintiffs filed their bill of complaint in this cause asking for an injunction to restrain the Farmers State Savings Bank from proceeding with such foreclosure proceeding. No temporary injunction was issued. The defendant answered the bill of complaint. On October 1, 1920, the case was heard. The judge filed his findings on December 28, 1920, and on January 8, 1921, a decree was filed requiring the defendant to permit the plaintiffs to redeem for the sum of $4,506.49, the amount of principal and interest on said mortgage, computed on the basis of plaintiff's claim of $4,150 computed to the 7th day of March, 1919.

After filing the bill defendant proceeded with the foreclosure proceedings and the property was sold at sheriff's sale and bid in by the defendant. The defendant brings the case here by appeal.

The whole controversy arises over the question of whether $1,050 was paid when the last receipt was given. The plaintiffs assert it was. The defendant asserts no money was paid at that time.

The trial judge expressed himself as follows:

"On the trial of the cause, plaintiffs produced written receipts and witnesses testifying to the payments having been made to defendant bank on said mortgage, as follows: December 10, 1918, $350; December 17, 1918, $500; December 28, 1918, $350; December 29, 1918, $1,050, and introduced in evidence the receipts from defendant evidencing such payments, each of the receipts for $350 bearing evidence on its face that it was for interest on the mortgages in question, and the other written receipts, one for $500 and the other for $1,050, bearing evidence that they were given in payment of money on the so-called Gleason mortgages, which said written receipts and oral testimony produced by plaintiffs made a *prima facie* case by plaintiffs of the payment of $2,250, on said mort-

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gages. Defendant bank gave testimony in support of its claim that plaintiffs paid to defendant on December 10th, $350, and on December 17th, $500, and on December 28th, $550, instead of $350, for which the receipt was given by defendant bank on that day; that it gave no receipt for the $200 additional amount claimed to have been paid by plaintiffs but that the $500 formerly paid and the $200 paid on the 28th, over and above the amount receipted for, was applied to liquidate the said $700 mortgage, which was discharged. Defendant bank gave further testimony that the receipt dated December 29th, for $1,050, did not represent any payment other than the $200 paid the day before, over and above said interest payment of $350, and that said receipt for $1,050 also included the two payments evidenced by the two receipts immediately preceding the one dated December 29th, the receipt of December 17th, of $500 and the receipt of December 28th of $350.

"While a receipt is not conclusive evidence of payment, the *prima facie* case having been made, the burden was on the defendant bank to show that the said receipt for $1,050 did not represent an actual payment of more than $200. Jones on Evidence, § 492, and cases cited thereunder.

"The language used under the above references in part is as follows:

> "'A written receipt is evidence of a high character, although it is not conclusive, it is *prima facie* evidence of the truth of the recitals which it contains. It is evidence of so satisfactory a character as not to be overcome except by clear and convincing testimony; and the burden of proof as matter of course rests upon the one attacking it.'

"On the trial of the cause the testimony clearly disclosed that one of the parties hereto was mistaken. The testimony produced by plaintiffs in connection with the written receipts was clear, consistent and convincing, which established *prima facie* their claim. The testimony on the part of defendant disclosed some confusion in connection with the transaction, and admitted errors in connection therewith. The testimony also disclosed that the mortgage indebtedness held by the bank against the property in question was not $6,400 but $6,050; that while two of the receipts stated

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on their face to be in payment of interest on the Gleason mortgage, the facts disclosed on the hearing was that there was only $350 due on interest at the time the two receipts for $350 each were given in payment of interest. Defendant's witness writing one of said receipts for interest testified that notwithstanding the receipt bore on its face the words, 'To apply on the George Gleason interest on real estate mortgage,' that it was not received by him for that purpose.

"It also later developed that there was some understanding between said Gleason and the bank that plaintiffs were to pay to the bank $350 more than the mortgage indebtedness, an item of no great importance, only that it was a transaction in which the plaintiffs had no knowledge, as they had been led to believe that there was $700 of interest on said mortgages, which they paid to the bank, and took receipts for; while in truth and in fact there was only $350 of same due on interest, and the other $350, while the receipt bore evidence of its being for interest, was to be applied in some other manner, of which plaintiffs had no knowledge; also there was evidence to the effect that the record of the bank did not disclose that the $700 mortgage was discharged, but that the $700 paid by plaintiffs had been applied by the defendant bank on a note, a personal obligation of Mr. Gleason.

"From the references above made, and other like circumstances indicated by the testimony, it is quite apparent that the defendant bank not only made erroneous entries in connection with this transaction, but was otherwise mistaken in connection with some feature of the deal, and since the burden of proof is on the defendant to show that said receipt for the payment of $1,050 on the 29th of December was erroneous, and did not represent what it purported to represent, in view of all the testimony given in the case and the plain expression of the record made, the court is forced to conclude that this burden of proof has not been met, and in consequence thereof has to take the receipts as showing the fact therein, thereby showing the total payment of plaintiffs to the bank to be $2,250 up to and including the 29th day of December, 1919."

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The claim of defendant is stated by his counsel as follows. We quote from the brief:

"Plaintiff claims that when he got the $1,050 receipt on the 29th he paid that sum to the bank; defendant denies this; says Gasta paid no money on that date but asked for and obtained that receipt as covering his former payments. It is undisputed that Gasta made a payment to the bank on December 28th, but he claims that on that date he paid only $350 while the bank claims he paid $550. On that date Mr. Fotheringham gave Gasta a receipt for $350 specifying that it was one year's interest on the $5,000 mortgage, and thereupon proceeded to the court house with Mr. Gasta and discharged the $700 mortgage from the records.

"The following day, December 29th, Mr. Gasta came to the bank and asked for a receipt for the money he paid. Mr. Fotheringham states that he thought he was asking for a receipt for the $200 (the amount of the payment being $550, $350 of which was receipted for as interest on the $5,000 mortgage), but Gasta wanted a receipt that would cover all his payments. Mr. Fotheringham states in detail in his testimony as follows:

"'He was in the bank the next day, that would be the 29th. He came in and wanted a receipt for what he had paid. He had had receipts previous to this for his different payments as he had made them, and I was going to give him a receipt for $200, and he says, "No, give me a receipt," he said, "I am done now, give me a receipt for the whole thing," and I did, not thinking that anything like this would come out of it. I started to write the $200 receipt and that is when he asked for a receipt to cover the whole thing. Exhibit E is the receipt that I gave him that day, that is on the 29th. No money whatever was paid on that day, this receipt covering the whole transaction and showing what was agreed upon was paid.'

"The previous payments were as follows:

First payment	$350.00
Second payment	500.00
Third payment, amount of not covered by the $350 receipt of the day before	200.00
	$1,050.00

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"The $1,050 receipt was given as a blanket receipt covering the above payments. It is defendant's claim that when Mr. Gasta got the $1,050 receipt on the 29th, he conceived the plan of claiming that he paid that sum of money in addition to what his other receipts showed and holding the bank for that amount."

The pivotal question in the case is, What was done when the receipt for $1,050 was given? Mr. Gasta's testimony is:

"On December 28th I went to the bank and paid Mr. Fotheringham, according to my receipt here, $350. The total payment by me was $350 at that time, and that is on December 28th. There is no question about that. On the next day December 29th I went back to the bank again and I paid $1,050 at that time. * * * My wife was with me at that time. I don't know as it could have been much after 2, because my wife went across and got the money out of the Bay City Bank, and that closes at 3 o'clock, and she carried the money right over with the band around it. * * * When we got into the bank Mr. Fotheringham was there. I didn't notice who else, there was Mr. Fotheringham I was doing business with. * * * I talked with Mr. Fotheringham right at the desk there at the front part. I did not go inside of the rail, but talked to him over the desk. At that time I paid $1,050. I am sure of that.

"*Q.* Got it from your wife, right out of her pocketbook?

"*A.* I got part of it from her.

"*Q.* You only got part of it?

"*A.* Yes.

"*Q.* I thought you said a moment ago that your wife went over and got that $1,050 in the Bay City Bank and brought it over in a roll and handed it to you when you got to the bank?

"*A.* I didn't say $1,050. She didn't get $1,050 out of the Bay City Bank on the 29th day of December. I didn't get any $1,050 out of any other bank on December 29th. My wife brought over $500 and I went in the bank and she turned the $500 over to me and I took some more money out of my own pocket. I had pretty close to $600.

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I turned over to Mr. Fotheringham $550 out of my pocket. I paid $1,050 altogether, and got a receipt from Mr. Fotheringham on the 29th day of December, 1917, for $1,050, and I actually paid $1,050 that day."

His testimony is confirmed by his wife except she says the payment was made December 28th, and the receipt was dated December 29th, because the bank official said the payment was after banking hours and the transaction would have to be carried into the next day's business. It is stated in the $1,050 receipt that the money is to apply on the Gleason account.

We have already quoted the version of the cashier as to the giving of this receipt. We again quote from the testimony of Mr. Gasta:

"With reference to the mortgage of $700, Mr. Fotheringham and I walked right up to the register of deeds' office, and it was discharged there while we were both together by Mr. Fotheringham signing on the book. The first knowledge that I had that there was any dispute between Mr. Fotheringham and I as to the amount owing on this property was about three months later. I don't know exactly. Mr. Fotheringham called me up and wanted to know if I was going to attend to that note in the bank, pay interest on it, or pay it, and I said, 'I have paid it.' This was over the 'phone, and he said 'no, you have not, and you are going to do something or I will do something,' so I told him to wait, I would get the receipts out of the safe, and read them to him over the 'phone, and when my wife got the receipts out I found out he was off the 'phone, so I got in the machine me and my wife, and went to the bank and seen him, and I asked him what was the trouble, and he says, 'you know what was the trouble,' he said, 'you either pay that today or I'll do something about it.' I don't know what he meant. 'Well,' I said, 'I came down here to find out what was wrong.' 'Well,' he said 'you know what's wrong, you pay that note or I will do something right away.' So I see I couldn't go ahead or deal with him, so I came down to the register of deeds' office and

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asked Mr. Lambert to look it up, and he opened up several books and looked it up, and he said Mr. Fotheringham discharged it with his own signature. I said, 'Will you please call him up and tell him about it?' So what the conversation over the 'phone was that Mr. Lambert and Mr. Fotheringham had I couldn't say, but I could hear Mr. Lambert say, 'Why, you discharged it with your own signature.' Well, then, he told me that Mr. Fotheringham wanted me back to the bank, so I went back to the bank, and finally he said, 'Sit down and we will talk things over,' he said, 'Let me see these receipts.' I said 'I haven't got them with me.' He said, 'Where have you got them?' I said, 'The attorney has got them.' He said, 'Will you get them for me?' I said, 'I guess I can.' So I went up in one of the office blocks and had copies made of the original ones I had, and all they had me credited in the books was $350 of the whole thing, but he asked me to leave the copies there. I did not see the books at that time. He said, 'All you have paid on here is $350.' He said, 'Would you leave them copies here and we will talk things over,' and I left them."

The only reference the cashier made in his direct-examination to this interview is as follows:

"*Q.* Will you tell us how it was that this application of the payments that was made by Mr. Snowden came to your attention later?

"*A.* In going over our mortgages that was past due, Mr. Gasta, I believe, was written to that the mortgage was—interest payment had gone by and was not paid, and he came in and inquired about it, and it was then discovered that the application had been made on Mr. Gleason's notes instead of the mortgage."

We now quote from the cross-examination of the cashier:

"On December 28th I wrote this receipt out and wrote it all in my own handwriting. That is the day Gasta paid me $550. I didn't give him a receipt for $550 because he was getting a mortgage discharged for the balance—after the $350 for the application of the interest.

"*Q.* He was getting a mortgage discharge was the

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reason you did not give him any receipt for only $350.

"A. Wouldn't he have a discharge in this?

"Q. I am just asking you questions. This receipt is written in your own handwriting, interest on George Gleason mortgage of $5,000, December 15, 1917?

"A. Yes.

"Q. You knew at that time that Gasta was paying on the Gleason mortgage, on the interest against it?

"A. Well, there was $350 out of $1,400 that was to apply as interest on the $5,000 mortgage.

"Q. Well, answer this. You knew that when you received these various items of money that they were paid you to apply on the Gleason mortgage?

"A. No, sir, I did not.

"Q. Then how did you come to take the money and write those receipts?

"A. The money was not all to be applied on the mortgage.

"Q. You didn't write that on any of the receipts, did you?

"A. Well, the receipts show for themselves.

"Q. Did you tell the truth on the receipts or lie when they were written?

"A. I don't think I lied about it. The first receipt was written probably before we just figured it was best to accumulate all this money until the deal was finally finished, and possibly the writing of the interest in the first receipt might have been done before we really thought about how to handle the deal.

"Q. Then you want to say now that when you wrote these receipts out that what you knew and what you wrote out are two different things, is that right?

"A. No, I wouldn't say that.

"Q. You knew what you were writing there then?

"A. Yes, sir.

"Q. Was it so or wasn't it then?

"A. After the receipt was made—

"Q. Was it so or wasn't it, what you wrote on the receipts?

"A. Well, I won't say either way on that.

"Q. Do you know?

"A. Yes, I know.

"Q. Now on December 29th when you gave this receipt for $1,050 why didn't you give one for $1,400?

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"*A.* Because he had one for $350 that made up the balance of the $1,400.

"*Q.* Well, he had one for $500, didn't he?

"*A.* Yes, sir.

"*Q.* And he had two for $350?

"*A.* Yes.

"*Q.* Then why did you give him a receipt for $1,050?

"*A.* Because he asked me to give him a receipt for the whole thing.

"*Q.* The whole thing was $1,400, wasn't it?

"*A.* Yes, sir.

"*Q.* And you didn't give him a receipt for the whole thing then?

"*A.* No, not on that one receipt, because he had the $350 receipt that paid the interest on the mortgage separate and distinct from the rest of the deal. He had two $350 and a $500 receipt. I knew that. * * * It was my business to report to the people that were keeping our books that that mortgage for $700 was to be marked paid. There seemed to be a misunderstanding between Mr. Snowden and I. Which of us just done wrong I am not prepared to say. It should have been the mortgage note that was canceled instead of one of Mr. Gleason's notes. I wouldn't be likely to come here and discharge a mortgage on the register of deeds' record and expect to continue it in the bank.

"*Q.* Well, as a matter of fact that is what you did do?

"*A.* Yes.

"*Q.* Then I say you made a mistake, or somebody did?

"*A.* Accidentally, yes, sir.

"*Q.* Now, I ask you about three months later than that instead of writing Mr. Gasta you called him on the telephone, isn't that the fact?

"*A.* It might be, I wouldn't say, possibly so.

"*Q.* When you called Mr. Gasta down here you claimed you had never discharged that mortgage, didn't you?

"*A.* I don't know how—we might have written him a letter or he might have come by telephone call.

"*Q.* Well, you said a moment ago you did call him by telephone, didn't you?

"*A.* I did not. I said we might have. I don't re-

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member just how we asked him to come in. When Mr. Gasta did come to the bank I don't think that he and I had loud words and argument about whether this mortgage had been discharged. I was not going to call up the patrol wagon and have Gasta arrested. I did not order him out of the bank that day. I didn't use profane language in front of Mr. Gasta's wife that day and afterwards apologize for it. I ascertained from the register of deeds' office that I had discharged the mortgage. After that I got Gleason and told him then that he owed us some money."

It has already appeared that the $1,050 receipt stated the money was to pay on the Gleason account. It has also appeared from his testimony that Mr. Fotheringham gave directions when money was paid in how the money should be applied.

Mr. Snowden testified in part as follows:

"Q. Then in the due course of that particular transaction on the 29th, did you find he had paid all he had to pay on that particular account?

"A. Yes.

"Q. And do you know what the total of that amount was?

"A. Yes.

"Q. What was it?

"A. $1,050.

"Q. Did you dispose of and apply the $1,050 on the 29th of December?

"A. Yes.

"Q. Now did you apply it on any particular $5,000 mortgage or $700 mortgage?

"A. No.

"Q. What did you apply those payments on?

"A. I applied the payments on Gleason's notes, his unsecured notes.

"Q. Is that a custom in the bank, to apply moneys received on unsecured notes in the absence of any specific instructions to the contrary?

"A. Yes, sir.

"Q. And you followed the usual custom in that instance?

"A. Yes.

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"*Q.* Had you received any instructions to apply it directly on that $700 or any other mortgage?
"*A.* No.
"*Q.* So in the absence of specific instructions, you applied it where you considered it should be applied?
"*A.* Yes, sir.
"*Q.* In making the application that you did, did you cancel some of the notes of Mr. Gleason?
"*A.* Yes.
"*Q.* And to what amount?
"*A.* I canceled three notes, according to the records of the bank.
"*Q.* What were they, and the amounts?
"*A.* One for $835, another for $75, and another for $100, and then there was an indorsement, that is, a partial payment made on another note of $15, that is, the indorsement amounted to $15.
"*Q.* That you put on the back of the four hundred?
"*A.* Yes, that note was not canceled.
"*Q.* And that would make a total of how much applied?
"*A.* $1,025.
"*Q.* Now what disposition was made of the remaining $25?
"*A.* That was interest.
"*Q.* On what?
"*A.* On the notes that I had credited here.
"*Q.* That is, on the Gleason notes that you had canceled there was interest to the amount of what?
"*A.* $25."

The testimony is very conflicting and it cannot be reconciled. If Mr. Gasta paid $550 December 28th, as the cashier testified, it is difficult to understand why he gave a receipt for $350. If, as claimed by the cashier, the receipt for $1,050 was given to the plaintiffs to cover all previous payments made by them, why was it not given for $1,400, for these amounts had concededly been paid. It is also a pertinent inquiry as to why it stated the money was to apply on the Gleason account followed immediately by its application on that account.

This case of course is to be heard *de novo* by us and

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is to be decided by the weight of the evidence as disclosed in the record. In case of conflicting testimony it is clear that the chancellor has a great advantage in hearing and seeing the witnesses. In the instant case we have the positive testimony of the plaintiffs that the money was paid. This testimony is confirmed by the written acknowledgment of the cashier that it was paid. A careful perusal of the record and the briefs of counsel and the able oral arguments of counsel, to which we listened attentively, has not convinced us that the decree is wrong.

It is affirmed, with costs to the appellees.

FELLOWS, C. J., and WIEST, CLARK, SHARPE, and STEERE, JJ., concurred. BIRD, J., did not sit.

The late Justice STONE took no part in this decision.

WORTMAN v. DETROIT UNITED RAILWAY.

1. APPEAL AND ERROR—EVIDENCE—DIRECTED VERDICT.
   In an action for personal injuries, where a verdict was directed in favor of defendant, the Supreme Court will consider the evidence in the most favorable view possible upon the question of whether an issue was presented for the jury.

2. STREET RAILWAYS — CROSSING ACCIDENT — NEGLIGENCE — SUBSEQUENT NEGLIGENCE—EVIDENCE—SUFFICIENCY.
   In an action for personal injuries caused by a collision between the truck in which plaintiffs were riding and defendant's street car, at a street intersection, where there

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was no proof that the perilous position of the truck was known or ought to have been known to the motorman for such a time previously that he could have stopped his car and avoided the accident, there was no room for the application of the doctrine of subsequent negligence.

3. SAME — CROSSING ACCIDENT — CONTRIBUTORY NEGLIGENCE — EVIDENCE.

A truck driver, whose view was obstructed, who approached a street intersection at such rate of speed that he was unable to stop his truck and avoid a collision after he discovered a street car approaching, was guilty of negligence as a matter of law.

Error to Wayne; Mandell (Henry A.), J. Submitted February 7, 1922. (Docket No. 68.) Decided March 30, 1922.

Case by Frederick Wortman and another against the Detroit United Railway for personal injuries. Judgment for defendant on a directed verdict. Plaintiffs bring error. Affirmed.

Baubie & Baubie, for appellants.

Corliss, Leete & Moody (*Frederic T. Harward*, of counsel), for appellee.

MOORE, J. Each of the plaintiffs sued the defendant. The cases were tried together. From a directed verdict in favor of the defendant the case is brought here by writ of error. On November 11, 1918 (Armistice day), the two plaintiffs were proceeding north in a Packard truck operated by one Parker on Lincoln avenue, Detroit. Before the truck approached the intersection of Forest avenue where defendant operates a single track west-bound street railway, one of defendant's cars passed. At that time Mr. Parker slowed down the truck to about 5 to 7 miles per hour and proceeded towards the intersection. A house on the southeast corner of the intersection

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obstructed the view to the east. At about 25 feet from the track one can see easterly on defendant's track a distance of about 175 feet. It is claimed that after the house was passed Mr. Parker looked east and saw defendant's second car coming at a high rate of speed, the first car having passed on; that the front of the truck extended in front of Mr. Parker a distance of 6 feet and when he saw the second car for the first time, the front of the truck was about 19 feet from the track; that the truck could have been stopped in about 18 to 20 feet, going at the speed and under the conditions of that day; that if Mr. Parker stopped the truck, the front of it would be on defendant's track or be struck by the over-hang of the car, which is 1½ feet; to avoid which he turned westerly on Forest avenue, applied more speed to the truck and attempted to run down the track ahead of the car, thinking that if defendant slowed down or stopped the car he would reach a place of safety; that defendant's car did not stop nor slow down but continued at high speed and struck the truck on the side at the westerly curb line of Lincoln avenue.

It is the claim of the defendant that the street car was under control, that the truck as it approached the intersection was going as fast or faster than the street car, and that, instead of the street car running into the truck, the truck ran into the street car. There were witnesses who sustained this contention. As a result of the impact the two plaintiffs were thrown out of the truck and sustained many fractured bones and other serious injuries. After all the evidence was in the court directed a verdict for defendant on the ground that Mr. Parker, the driver of the truck, was guilty of contributory negligence, and that the doctrine of gross negligence or "last clear chance" did

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not apply to the case, citing the case of *Miller* v. *Railway*, 200 Mich. 388.

A verdict having been directed in favor of the defendant the court must consider the evidence in the most favorable view possible upon the question of whether an issue was presented for the jury. *Krouse* v. *Railway Co.*, 215 Mich. 139.

Counsel say:

"But assuming, but not conceding, for the sake of argument, that the plaintiffs' evidence showed them guilty of negligence in the first instance, we submit that the question of defendant's gross negligence should have been submitted to the jury under proper instructions.

"Plaintiffs' evidence, and in fact all of the evidence, presented this issue for the jury, viz.: Was defendant guilty of gross negligence in failing to stop or slow down its car after plaintiffs' position of peril was, or in the exercise of due care should have been discovered by defendant's motorman? The motorman was negligent in not stopping or slowing down the speed of the car."

It goes without saying that the motorman could not see the truck until it had arrived at a position where the driver of the truck could see the car. We think there is no room for the application of the subsequent negligence doctrine in this case. There is no proof that the perilous position of the truck was known or ought to have been known to the motorman for such a time previously that he could have stopped his car and avoided the accident.

In *Champaign* v. *Railway*, 181 Mich. 672, this court said:

"The rule of discovered negligence can have no application here. This turn upon the track was made when the car was less than 30 feet away. As soon as an intention to cross was first made apparent, the motorman did everything possible to give warning, stop the car, and avoid the accident."

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In *Fritz* v. *Railway Co.*, 105 Mich. 54, it was said:

"This rule has been applied by this court in street railway cases. * * * In each of these cases the situation of plaintiff was such that it was apparent to the motorman that, if the car continued in its course, a collision would be inevitable, and this was apparent to him for a considerable time before the collision. Do these cases necessarily rule the present?

"In this case it is apparent that the collision was of a sudden. The motorman did not see in advance that the plaintiff was about to cross the track, nor until a very few seconds before the collision actually occurred."

See, also, *Knickerbocker* v. *Railway Co.*, 167 Mich. 596; *Putt* v. *Railway Co.*, 171 Mich. 216; *Buxton* v. *Ainsworth*, 138 Mich 532 (5 Ann. Cas. 146).

The case then must turn upon the question of whether Mr. Parker, the driver of the truck, was guilty of negligence as a matter of law. Mr. Parker, the driver of the car, testified that after the first car passed he slowed down to 7 miles an hour, that a house on the southeast corner of the intersection cut off his view so that he could not look up the track in the direction from which the cars came until he got within 25 feet of the track, that he was 6 feet back of the front of the truck, that the overhang of the street car was 1½ feet and that he saw he could not stop the truck before it would reach the track, and for the purpose of avoiding the collision turned to the left hoping to run ahead of the car, and that he had hardly started to turn before the collision occurred.

On the cross-examination he said in part:

"*Q.* I say, you knew if he did not slacken, you could not go across?

"*A.* I couldn't tell whether I could or not.

"*Q.* If you had stopped when you first saw the car, you would have had five feet to spare?

"*A.* I would have stopped on the track in front of the car. If I had approached that track at the rate

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of 4 miles an hour, I could have stopped the truck in 12 feet, I should think. If I approached it at 3 miles an hour, I could have stopped the truck. I couldn't say exactly, 6 or 7 feet.

"*Q.* Then, it was the speed that you were approaching the track that caused you not to be able to stop within 20 feet wasn't it?

"*A.* Speed at 7 miles an hour?

"*Q.* You say yourself if you had been going 3 or 4 miles an hour you could have stopped in 12 feet, 8 feet to 12 feet?

"*A.* Yes.

"*Q.* But you were going at such a speed when you got out from behind that building and you saw the street car, that you could not stop without going upon the track?

"*A.* Well, I don't know for sure whether I could stop or not. You see, I figured if I had stopped, I would have been right in front of the car.

"*Q.* Then you knew if you figured you would be right in front of the track, if you did stop, you knew well that it would not do for you to go straight ahead?

"*A.* Unless I swung so that if he did hit me, he would hit me in the back of the truck.

"*Q.* When you got out from behind that building and saw things the way they were, saw the street car coming, you knew that you could not stop if you went straight ahead until you got on the track?

"*A.* I figured I couldn't stop in time, that's all. I figured that he could slow up. So I made a turn to the west, diagonally to the northwest."

The other testimony of the plaintiffs was to the effect that after the driver of the truck reached a point where he could see a street car approaching the intersection of Forest avenue and Lincoln avenue, he could not stop the truck before it would reach the street car track.

The case is unlike *Calvert* v. *Railway,* 202 Mich. 311; *Reichle* v. *Railway,* 203 Mich. 276; and other cases cited by counsel for appellants as will appear by an examination of those cases.

The instant case is more like a line of cases, examples of which are *Donlin* v. *Railway,* 198 Mich. 330;

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Colborne v. *Railway*, 177 Mich. 139; *Miller* v. *Railway*, 200 Mich. 388, and the cases cited therein.

The judgment is affirmed, with costs to the appellee.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

PEOPLE v. CRAWFORD.

1. CRIMINAL LAW—INDORSING NAMES ON INFORMATION—CONTINUANCE—DISCRETION OF COURT.

   The granting of a motion for leave to indorse the names of additional witnesses on the information, and denial of defendant's motion for continuance of the case to allow opportunity to investigate the testimony of the newly indorsed witnesses, *held*, within the discretion of the trial court.

2. SAME—CONTINUANCE—ABUSE OF DISCRETION.

   Where six days' notice of the motion to indorse was given defendant's counsel, and of the three such witnesses sworn, the testimony of two was stricken from the record, and the only one whose testimony remained in the case was called by defendant for examination under the statute, it cannot be said that defendant was surprised, or that there was abuse of discretion in denying defendant's motion for a continuance.

3. SAME—BANKS AND BANKING—EMBEZZLEMENT—EVIDENCE—SUFFICIENCY.

   In a prosecution of the cashier of a bank for embezzling funds of the bank under 2 Comp. Laws 1915, § 8027, evidence that defendant credited to a firm of which he was

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On evidence of other crimes in prosecution for embezzlement, see notes in 62 L. R. A. 193, and 43 L. R. A. (N. S.) 226, 264.

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a member the amount of two certificates of deposit which the maker of a note to the bank paid to him for the purpose of paying the note before it came due, which he was informed was in the hands of another bank as collateral, and therefore not surrendered to him, and which was carried on the books of the bank as a live asset, even after it was returned, *held*, sufficient to justify conviction; defendant's contention that he acted merely as agent of the maker in accepting the money to pay the note when it was returned being untenable.

4. SAME—PROOF OF SIMILAR TRANSACTIONS COMPETENT.
Proof of similar transactions to show intent is competent in a criminal prosecution of a cashier on a charge of embezzling from the bank.

5. SAME—INTENT—TRIAL—INSTRUCTIONS.
An instruction that "the law presumes that every man intends the consequences of his own act, and if knowingly and intentionally committed cannot be excused on the ground of innocent intent," *held*, when read in connection with the charge as an entirety, not misleading, although standing alone it might be questionable.

Exceptions before judgment from Gratiot; Hart (Ray), J., presiding. Submitted January 13, 1922. (Docket No. 168.) Decided March 30, 1922.

Alfred F. Crawford was convicted of embezzlement. Affirmed.

William A. Bahlke and *Archie McCall* (*George P. Stone*, of counsel), for appellant.

Merlin Wiley, Attorney General, and *O. L. Smith* and *J. E. Converse*, Assistants Attorney General, for the people.

STEERE, J. The nature and story in outline of the crime for which defendant was tried and convicted may be best gathered from the body of the information which charges that on October 22, 1920,—

"he the said Alfred F. Crawford, being then and there

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cashier of the First State Savings Bank of Breckenridge, Michigan, as such cashier, did then and there feloniously, wilfully and unlawfully embezzle, abstract and misapply certain moneys, funds, credits and property of said bank and owned by it, to wit, $2,000 lawful money of the United States of America of the value of $2,000 lawful money of the United States of America, said moneys, funds, credits and property having been heretofore, to wit, on said 22d day of October, A. D. 1920, delivered to said Alfred F. Crawford as such cashier by one L. S. Morey in the form of two certificates of deposit, issued by said bank to said L. S. Morey for, to wit, the sums of $1,590 and $500, respectively, in payment of a certain note given by said L. S. Morey to said bank for $2,000 dated 3-12-20 and due on or before January 1st after date, with interest at the rate of 7 per cent. per annum, after date until paid, which moneys, funds, credits and property said Alfred F. Crawford, as such cashier, then and there accepted and received in such payment and marked said note paid but failed to enter such payment on the books, files and records of said bank, but credited said moneys, funds and credits and property to the private account of said Alfred F. Crawford and one Orville G. Colthrop on the books, files and records of said bank and which moneys, funds, credits and property after being so credited to said account of said Alfred F. Crawford and said Orville G. Colthrop was by said Alfred F. Crawford then and there used and converted to his own use and benefit, with intent then and there to injure and defraud said bank and said L. S. Morey and to deceive the officers of said bank and the agent appointed to examine the affairs of said bank contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the State of Michigan."

The provided statute upon which the prosecution relies is section 58 of the State banking laws (2 Comp. Laws 1915, § 8027), which provides as follows:

"Every president, director, cashier, treasurer, teller, clerk or agent of any bank who embezzles, abstracts or wilfully misapplies any of the moneys, funds, credits or property of the bank, whether

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owned by it or held in trust, or who, without authority of the directors, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment or decree, or who makes any false entry in any book, report or statement of the bank, with intent in either case to injure or defraud the bank, or any company, corporation or person or to deceive any officer of the bank or any agent appointed to examine the affairs of such bank, and any person who with like intent aids or abets any officer, clerk or agent, in violation of this section, or who shall issue or cause to be issued, or put in circulation, any bill, note or other evidence of debt to circulate as money, upon conviction thereof, shall be imprisoned in the State prison." * * *

Proof by the prosecution, unmet by contradicting testimony, showed defendant Crawford was cashier of the State Savings Bank of Breckenridge which had been organized under the banking laws of this State and was subject to examination by the banking department of Michigan. Dr. Loren S. Morey was a dentist located in Breckenridge, acquainted with Crawford and a customer at said bank. On March 12, 1920, he negotiated a loan of $2,000 of said bank through Crawford, giving his note to the bank for that amount, due on or before January 1, 1921, secured by a certificate of deposit for $500 and a mortgage covering property in Edmore, Michigan, for $1,500. This mortgage ran until October 15, 1920, and he wanted the bank to collect the same when it fell due. Inquiring at the bank on October 22, 1920, he learned from Crawford that the mortgage had been paid, amounting with interest to $1,590, and he then told Crawford he was ready to pay the $2,000 note he owed the bank. During the conversation Crawford passed to him the $500 certificate of deposit and another for the amount received by the bank in payment of the Edmore mort-

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gage, which the doctor pushed back saying he did not want those papers but wanted his note. Crawford then computed the interest due on the Morey note and subtracted the total from the sum of the two certificates of deposit which left a balance in Morey's favor of $26.50 and Crawford then handed him that amount in cash. When Morey asked for his note Crawford said he could not give it to him then as it had been used by the bank as collateral in borrowing money from outside and he would get it for him. When Morey was in the bank a week or ten days later Crawford told him the note was not back yet and he would touch them up, as they had given ample security in its place and it was returnable.

When in the bank somewhere near December 1, 1920, Morey inquired about his note of the assistant cashier, Mr. Colthrop, who replied he would touch them up again and get it as soon as possible, to which Morey said, "When you get it let me know by 'phone or hand it in to my office." On being answered by Colthrop that he would do so Morey made no further inquiry and dismissed the subject from his mind, having full confidence in the bank and Crawford's integrity as its cashier. It was shown by the records of the bank and Colthrop's testimony that Morey's $2,000 note to the First State Savings Bank of Breckenridge, given March 12, 1920, and paid in full at the bank to Crawford on October 22, 1920, had been on March 26, 1920, sent to the Second National Bank of Saginaw as collateral to a loan of the Breckenridge bank where it was held until January 22, 1921, when it was returned and stamped paid by Colthrop.

On October 22, 1920, when Morey paid his note at the Breckenridge bank to Crawford, the latter canceled Morey's two certificates of deposit and entered them as paid upon the bank's register of certificates of deposit and made out a deposit slip showing the pro-

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ceeds, or money so paid him by Morey in liquidation of his note to the bank, deposited to the credit of the private account of Crawford & Colthrop, a partnership in which Crawford was personally interested. This account showed an overdraft of some $800 at the close of business the night before.

The bank had amongst its books the usual bank discount register for keeping a record of the number, name of payor, date, amount, etc., of every note taken by the bank. Morey's $2,000 note of March 12, 1920, was properly entered in the bank discount register but not charged off when paid, or later, and continued to be carried in that register as a live asset of the bank.

It was further shown by the prosecution that on January 31, 1921, two State bank examiners named Kalahar and Millard went to Breckenridge for the purpose of examining and auditing the books of the State Savings Bank located there, having been assigned to that duty in the regular routine of their employment by the State banking department. They remained there engaged in that work until about March 15, 1921. On arrival at the bank they found defendant Crawford in charge as its cashier with his assistant Colthrop present, and being received in the customary manner proceeded with their work. One of their first duties was to take charge of the note case containing the notes that belonged in the note balances and audit them. This note case Crawford produced and handed over to them as containing all the live notes which should be run in the note balances as assets of the bank, or if any were out for collateral a temporary record so showing. They then proceeded to list and total them on the adding machine, or "run them" as it is called. They found the total as compared with the note balance shown by the general ledger of the bank to be short $3,330 and called Crawford's attention to it, who with them checked over the notes and verified

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their result. He then produced a receipt for six notes dated March 26, 1920, given by a Saginaw bank for some notes held as collateral for a loan to the Breckenridge bank showing a township of Wheeler order for $1,000 which he claimed should be counted in the live list notes and was credited on the note shortage by the examiners. Some time later he told them, "We have found $2,000 of that shortage." Asked "Where," said "The L. S. Morey note marked 'returned' is here in the bank and should have been placed back in the files." The Morey note was then handed to Kalahar who after examining it called Crawford's attention to the fact that it was stamped "paid" by the bank. Crawford then said that Colthrop had so stamped it in error and placed it with the dead notes. Kalahar then took the bank's discount register and found the entries in it pertaining to the Morey note showed it was yet alive and told Crawford it was not marked paid on the discount register, to which Crawford replied, "it wasn't marked paid on the discount register because it hadn't been paid." In reply to the inquiry of whether they should include it in the balance, total, of the live assets of the bank he answered, "Yes, you should." Kalahar so credited it and went on with his work; but the next day located Dr. Morey and interviewed him in his office, learning from Morey himself that he had paid the note at the bank to Crawford on October 22, 1920. After checking up and verifying payment of the Morey note from the records of the bank, as before indicated, he again interviewed Crawford with reference to it, called his attention to the deposit slip crediting the overdrawn account of Crawford & Colthrop with $2,063.50 on October 22, 1920, and said, "You deposited $2,063.50 to the Crawford & Colthrop account that day out of the certificates turned in by Mr. Morey, didn't you?" and Crawford replied that he did. Asked why he put the proceeds of the note in that account he re-

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plied, "because that account needed the money." The amount was then charged by the bank examiners to the general shortage account and subsequently O. K.'d by Crawford in his own handwriting. Other claimed similar shortages of defendant Crawford were discovered by the bank examiners and proof of the same offered by the prosecution on the trial for the purpose of showing intent to defraud. Three of these were admitted in evidence for that purpose against defendant's objection, while objections were sustained as to others.

Six days before the case came on for trial a motion in due form was filed and notice thereof served upon counsel for leave to indorse the names of eight additional witnesses on the information. This motion and one to quash the information were argued together. The motion to quash the information was denied and defendant's counsel now concede in their brief that, in view of the prosecuting attorney's statement when arguing the motion that they would rely for conviction on the Morey transaction, "refusal of the court to quash the information was not prejudicial error."

On the motion for leave to indorse additional witnesses being granted, counsel for defendant moved for a continuance of the case to allow opportunity to investigate the testimony of the newly indorsed witnesses which the prosecution might introduce. This motion was denied. The granting of the motion for leave to indorse new names on the information and denial of the continuance are urged as prejudicial error. The motion for leave to indorse names of additional witnesses was in due form, and verified by an affidavit of the prosecuting attorney showing that he first learned their testimony was material to the issue to be tried on the afternoon of the day the motion was filed and served. Service was made upon opposing

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counsel six days before the time of trial, accompanied by the prosecuting attorney's affidavit giving the names and residences of the proposed witnesses. All but one of these witnesses resided in Michigan, five of them in Breckenridge and two others not far away. Granting of this motion was within the discretion of the trial court; as was also the denial of defendant's motion for continuance. Only in case of a palpable abuse of discretion will a discretionary ruling be disturbed by a reviewing court.

As to the contention that it was an abuse of discretion to deny defendant's application for a continuance and force him to trial with no opportunity to investigate and prepare to meet the testimony of witnesses just indorsed, it first appears that six days' notice of the motion with names and addresses of witnesses was served upon defendant's counsel. The record further discloses that of those eight witnesses whose names were indorsed but three were sworn and the testimony of two of them was stricken out by the court and the jury directed to disregard the same. One of those two witnesses was the witness residing outside the State. The one whose testimony remained in the case was Ernest Muscott who resided in Breckenridge. He was not called by the people, but evidence was introduced by the prosecution, mostly from the bank records, to show a claimed similar transaction prior to the offense charged, which is called in the briefs of counsel "the Muscott transaction." In urging objection to that evidence counsel for defendant said in part, "We are entirely familiar with the transaction referred to and have our own explanation for it," and after the evidence was introduced called Muscott as a witness under the statute. It would scarcely seem that the defense was taken by surprise as to this witness, unless by the prosecutor's failure to call him.

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The case had before been continued on defendant's motion, and under all the circumstances disclosed by this record we cannot conclude that the trial court committed an abuse of its discretionary power in denying defendant's motion for a continuance.

Of the situation presented by the evidence in relation to the Morey transaction on which this charge is based, counsel for defendant say in general:

"The respondent's position on the trial was and is that Dr. Morey left the money to pay the note with Mr. Crawford as a personal deposit and not as cashier."

A like contention to the effect that Crawford was agent of the customer of the bank, rather than of the bank in which he was then employed as cashier, is urged as to the claimed similar transactions of which proof was admitted, against defendant's objection, as bearing upon his intent in the offense charged.

Allied with the claim that Crawford was acting as Morey's agent for payment of the note he had given the bank when it should be returned, and did not accept or retain the certificates of deposit as payment, or as cashier of the bank, it is contended defendant's request for a directed verdict should have been granted for the reason that it appears without dispute Morey was fully advised the note was then elsewhere, hypothecated as collateral, and held "in due course" by another bank, and he then understood that the certificates of deposit which he left with Crawford were received and to be held for the purpose of paying the note when returned to the Breckenridge bank, and under the law of commercial paper the Saginaw bank with which the $2,000 note had been hypothecated was the *bona fide* holder of the paper in due course, and while so holding the only party legally entitled to receive payment thereon. To this counsel cite section 54 (2 Comp. Laws 1915, § 6093) of our negotiable instrument law defining a holder in due course, and

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section 90 (§ 6129) defining payment in due course as follows:

"Payment is made in due course when it is made at or after the maturity of the instrument to the holder thereof in good faith and without notice that his title is defective."

There is abundant evidence, oral and written, to sustain a finding of the jury that on October 22, 1920, when Morey found his mortgage was paid at the bank, he told Crawford he wanted to, thought he had and, in fact, did pay the $2,000 note he had given the bank with money he then had on deposit there, and that Crawford as the bank's cashier accepted the certificates of deposit Morey pushed back to him for that purpose, paying him the difference in interest, canceling the certificates and transferring the fund so that, as between Morey and the bank, the note he had given it was paid in full. That the bank could not deliver the note to him that day because held elsewhere as collateral would not invalidate its payment as between themselves. The bank still owned the note. The Saginaw bank only held a special interest in it as pledgee while the general property or ownership remained in the pledgor. 21 R. C. L. p. 640.

"Where a holder has a lien on the instrument, arising either from contract or by implication of law, he is deemed a holder for value to the extent of his lien." 2 Comp. Laws 1915, § 6068.

"The terms 'collateral security' and 'collateral' are used to designate a pledge of negotiable paper, shares of corporate stock or other incorporeal personalty, as distinguished from a pledge of corporeal chattels." Jones on Collateral Securities (3d Ed.), § 1.

It is also urged for defendant that conviction cannot be sustained because the money which Morey left there never became the property or funds of the bank, and even if received by Crawford as its cashier was

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a special deposit for a specific purpose, to be held and applied in payment of a depositor's note when returned from the Saginaw bank, thus keeping the right of property and title to the money so deposited in Morey.

Tested by the two certificates of deposit signed by Crawford as cashier this money was received by the bank as a general deposit, payable to the order of the depositor "in current funds on return of this certificate properly indorsed," thereby establishing the relation of debtor and creditor under the settled rule as to general deposits, and not that of bailor and bailee as in case of a special deposit where the identical money left with the bank as a bare custodian must be kept distinct from the general funds of the bank, to be returned or applied as specified, the bank having no authority to mingle it with its own or other funds or use it in its business. By a general deposit the money becomes the absolute property of the bank, received as a loan, for which the bank is indebted to the depositor for that amount. The only thing Morey ever did with that general deposit was to pay or try to pay his note. If he did not succeed it yet remained a general deposit and an asset of the bank, which was indebted to him in that amount, a relation which could not be impaired by the fact that Crawford may have on that day credited from the bank's funds approximately that amount to the overdrawn account of Crawford & Colthrop.

The competency of proof of similar transactions to show intent is well settled by authority in this jurisdiction and elsewhere. That subject is quite fully reviewed by Justice FELLOWS with numerous citations in the recent case of *People* v. *Rice,* 206 Mich. 644. Admitting the general rule, defendant's counsel contend that the three transactions of which evidence was admitted were not so analogous as to come within the rule, and therefore incompetent.

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Briefly stated, those transactions though not identical were similar to the one charged in the entries and manipulation of funds tending to indicate misapplication of assets of the bank. In the first, Muscott left at the bank $1,640 for liquidation of a mortgage to one Ladd. Crawford as cashier gave him an official receipt therefor and entered the amount on the deposit register of the bank as a general bank deposit by Ladd. On the same day he credited that amount as a deposit to his own account, converting the same to his own use. In the second transaction, a check payable to the First State Savings Bank for $1,025 was received by Crawford to apply upon a loan of $4,000. This was at least *prima facie* funds of the bank. He officially indorsed this check and credited the amount to his private account. In the third transaction $5,500 came into Crawford's hands as cashier of the bank in connection with the sale of some notes by the bank to the party paying the money. Instead of depositing the full amount in the funds of the bank, he indorsed $3,500 of it on a note which he had indorsed and was contingently liable to the bank for. Attending circumstances are claimed for the defense to show these were personal transactions with Crawford, involving no manipulation or misapplication of the funds of the bank and no criminal intent. These claims were recognized by the court as raising issues of fact in its charge to the jury, each act being separately referred to, and defendant's claim in relation to it stated, with the instruction that it was for them to pass upon, and consider only as bearing upon the question of intent in the case on trial if guilt was shown in that transaction, saying in part:

"The evidence of each of these transactions must satisfy your minds in each case that they were completed transactions and completed offenses in the misapplication of the funds of the bank. * * * You

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cannot convict the respondent if you find that on each and every other transaction he made a misapplication of the funds if you do not think he made a misapplication of the funds as I have instructed you under the charge contained in the information."

We find no error in admission of testimony relating to those transactions as guarded in the charge of the court.

It is further urged that the court erroneously instructed the jury intent to injure and defraud followed from bare proof of the act and should be inferred from conversion of the bank's money to defendant's own use, which does not follow when a particular intent must be found. To that contention the following excerpt from the charge is quoted:

"The law presumes that every man intends the consequences of his own act; and * * * if * * * knowingly and intentionally committed, cannot be justified or excused on the ground of innocent intent."

Standing alone the language might be questionable, but read in connection with the charge as an entirety it does not impress us as misleading. The court instructed the jury at length on the various issues of fact involved for them to decide and principles of law which should govern their deliberations, submitting to them defendant's claim of good faith and innocent intent, to be determined by them from all the facts and circumstances shown, which they were instructed to take into consideration, including the testimony of witnesses produced by him as to his good character and stating the proper rules of law upon that subject. The necessity of clear and distinct proof of intent as charged was more than once pointed out. During the charge the court told the jury amongst other things:

"Under the court's conception of this statute there are certain elements which I have told you must be

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proven; * * * that the bank owned a note given by Dr. Morey for $2,000 that was carried on the books of the bank as an asset * * * that the defendant intended to act as such cashier of the bank for and in behalf of said bank, and that Dr. Morey did give and pay to said bank the said sum represented by the two certificates in question for payment of his said note, and the said defendant intended to and did receive said certificates of deposit and accept the same in full payment of that note * * * and that the note was paid by that transaction. * * * That the defendant took said note or funds which belonged to said bank, if you find it did belong to said bank, and wilfully misapplied said funds as the people have herein charged in their information. * * * That the defendant intended to and did injure and defraud the bank by such transaction; * * * that wilful misapplication, which is made a criminal offense by the law of this State, and the section of the law which I have read to you, or the statute referred to, means the misapplication knowingly and designedly, made by the officer charged, for his own use and benefit or for the use and benefit of some person or company other than the bank whose money, funds or assets have been misapplied or misappropriated. * * *

"So I say that the defendant must have made these entries knowingly and designedly upon the books of the bank, with intent to injure and defraud the bank. * * * But if a man knows that the act he is about to commit will naturally and necessarily have the effect of injuring and defrauding the bank and he voluntarily and intentionally does that act, the law will charge him with intent to injure and defraud the bank."

Counsel for defendant cite as confirmatory of their contention *People* v. *Comstock*, 115 Mich. 305, which seems to be the only previous occasion in which this court had before it for consideration the section under which the present prosecution is laid. It was there held that, as the offense charged involved a specific intent to injure and defraud a bank, such intent was not necessarily deducible from the bare fact an agent or officer of the bank extended credit to a customer

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who was already a borrower there beyond the bank's legal limits, which is quite different from knowingly and intentionally making misleading entries as to the transaction and appropriating money of the bank to the agent's own use. A comparison of the section of the Michigan act under which defendant is charged with section 9772, 9 U. S. Comp. Stat. 1916 (Rev. Stat. § 5209), discloses a close analogy in the general wording and statement of essentials to constitute the statutory offense created. The annotations to that section of the Federal act cite and review numerous decisions construing and applying it which are illuminating upon certain phases of this case.

After an examination of this entire record with reference to the various assignments of error urged in defendant's behalf we conclude defendant has had a fair and impartial trial, with his rights energetically protected by able counsel, and find no prejudicial error calling for reversal.

The verdict will stand affirmed, and the case is remanded for judgment thereon.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and MOORE, JJ., concurred.

The late Justice STONE took no part in this decision.

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PEOPLE v. BEST.

1. CRIMINAL LAW — EVIDENCE — ADMISSIBILITY — CONFESSIONS — WEIGHT FOR JURY.

In a prosecution for murder, where the question as to whether defendant's confessions were made under duress, as claimed by him, or voluntarily, as claimed by the officers and others, was properly submitted to the jury, it was not error to receive them; their weight being for the jury.

2. SAME—EVIDENCE—ADMISSIBILITY.

Testimony that defendant told witness that after the murder he went to the river, washed his hands, dried them on deceased's handkerchief, that he then threw the handkerchief into the river, and that witness later found a handkerchief on the bank of the river, *held*, properly admitted, with the handkerchief, although it was not identified as belonging to deceased.

3. HOMICIDE — MURDER WITH INTENT TO RAPE—TRIAL—INSTRUCTIONS—EVIDENCE.

In view of 3 Comp. Laws 1915, § 15192, defining murder in the first degree, where there was evidence from which the jury might infer that the theory of the prosecution that defendant committed the murder while attempting to commit rape was right, there was no error in submitting the case to the jury on said theory, under proper instructions.

4. SAME—EVIDENCE—CORPUS DELICTI.

Evidence *held*, sufficient to establish the *corpus delicti*.

5. SAME—TRIAL—INSTRUCTIONS AS TO MANSLAUGHTER.

Where there was evidence to support the charge that defendant killed deceased in an attempt to commit rape, an offense made murder in the first degree by 3 Comp. Laws 1915, § 15192, an instruction that there was little evidence touching on the phase of manslaughter, *held*, not prejudicial error.

On the question of proof of *corpus delicti* in homicide, see note in 68 L. R. A. 35.

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6. CRIMINAL LAW—TRIAL—INSTRUCTIONS.
Complaint that the charge was argumentative, that the trial judge singled out the witnesses by name and gave undue emphasis to the testimony of the witnesses for the people, *held*, not reversible error.

7. SAME—TRIAL—INSTRUCTIONS AS TO GOOD CHARACTER.
An instruction not denying to accused the benefit of good reputation, but instructing the jury that, if the evidence was convincing beyond a reasonable doubt, it was their duty to convict notwithstanding the good reputation, *held*, not reversible error.

8. NEW TRIAL.
Motion for new trial, *held*, properly denied.

9. CRIMINAL LAW — CIRCUMSTANTIAL EVIDENCE — MISCARRIAGE OF JUSTICE.
Evidence reviewed, and defendant's conviction *held*, under the record, not to amount to a miscarriage of justice.

Error to Oakland; Rockwell (Kleber P.), J. Submitted January 12, 1922. (Docket No. 147.) Decided March 30, 1922.

Anson Best was convicted of murder in the first degree, and sentenced to imprisonment for life in the State prison at Marquette. Affirmed.

Ralph T. Keeling (*Elmer E. Stockwell* and *Clifford A. Bishop*, of counsel), for appellant.

A. Floyd Blakeslee, Prosecuting Attorney, for the people.

CLARK, J. Some persons who, near midnight, had returned from a dance, were chatting for a moment in front of the dwelling of one of them. They became suspicious of the appearance and conduct of a man upon the porch of a vacant house across the street. One of them, Clifford Whittemore, having an automobile, went for a police officer, returned with him,

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and they found upon the porch the dead body of Vera Schneider, who in life had been a young unmarried woman employed in Pontiac as a telephone operator. Handkerchiefs were tied about her throat. There was blood upon her face. Other police officers were called. Whittemore went for an undertaker. The vacant house was near a river. About this time a witness said he met defendant coming from the direction of the river, along the river bank, and defendant was brushing his clothes and wiping his hands with a handkerchief. Soon thereafter defendant came along the street, crossing it diagonally toward the scene of the murder, and was passing immediately in front of the vacant house when he was stopped by one of the police officers there waiting. His hands and clothing were examined. He was shown the body, and was questioned by the officers. He, a comparative stranger, attempted an explanation of his being in that part of the city at that hour and was permitted to go.

The undertaker and officers found no disarrangement of the clothing of the deceased. Later examination of the body by physicians disclosed discolorations about the head and throat and that death had been caused by strangulation. No other marks upon the body were found. She had not been ravished, nor did the genital organs indicate an attempt. She had never been violated. Several witnesses identified the defendant as the young man who had been about the city in her company that evening. When last seen together they were on the street between 10:30 and 11:00 o'clock. Defendant was taken into custody. He confessed the killing, but he told differing stories of the particulars thereof. Part of the confession was that prior to that evening he had not known the deceased; that after meeting and being about the city they went to the porch of the vacant house. He placed his coat

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upon the porch. They sat or lay upon it. They embraced and kissed. He intended sexual intercourse. At what he thought the opportune moment he pressed his intention, but she refused and became hostile, but later she again became pleasant and familiarities were resumed and again he sought to accomplish his purpose. She again became hostile and threatened to call an officer. He struck her. She fell over, breathing heavily, rolling her eyes. Thereupon he choked her to death, using his hands and his handkerchiefs. Then he attempted to wipe the blood from her mouth. He was interrupted by the coming of Whittemore. He went to the river and washed his hands. A handkerchief was later found near the spot on the bank of the river. The confession was made to the officers, and was taken stenographically and transcribed. It was repeated in essential parts to others, newspaper reporters and to defendant's brother. Defendant at the trial sought to repudiate his principal confession, claiming that it had been obtained by duress, and third degree methods generally, on the part of the officers; and claiming, too, that when he made the other confessions, particularly to his brother, he was under the duress so exercised. This claim was denied flatly by the officers and others who heard the confessions. The confessions were received in evidence. Defendant had the benefit of several character witnesses. The information was in the statutory short form provided by section 15739, 3 Comp. Laws 1915. He was convicted of murder in the first degree and has appealed.

1. It was not error to receive the confessions in evidence. The testimony of defendant of duress, threats and promises by which the confessions were obtained is fully and flatly contradicted by the testimony of the officers and others, who said that the confessions were made freely and voluntarily. This made

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a question for the jury to determine, and to determine what weight, if any, should be given to the confessions, and the question was submitted with instructions fully protecting the rights of the accused. For a discussion of this question and an instruction somewhat similar to the one here, see *People* v. *Johnson*, 215 Mich. 221.

2. One Robbins, a reporter for a newspaper, was told by defendant, it was testified, that after washing his hands in the river he had wiped them with a handkerchief of the deceased and had then thrown it into the river. Robbins went to the place on the river bank and found, lying on a pile of ashes, a woman's handkerchief, crumpled and soiled. It was not identified as belonging to the deceased. It was shown that she habitually carried two handkerchiefs and that after her death but one was found on the body. We think that under all the facts it was not error to receive in evidence Robbins' testimony and the handkerchief so found.

3. Section 15192, 3 Comp. Laws 1915, defines murder in the first degree:

"All murder which shall be perpetrated by means of poison, or lying in wait, or any other kind of wilful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery or burglary, shall be deemed murder of the first degree, and shall be punished by solitary confinement at hard labor in the State prison for life."

The theory of the prosecution was not merely a deliberate and premeditated killing, but a killing in an attempt to perpetrate the crime of rape. The case was tried on that theory and the jury were instructed accordingly. We think the instructions submitting such theory were sufficient. But it is urged that there was no evidence of attempted rape and that it was

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error to suggest it in the charge. From a review of the evidence of the people the following appears:

That defendant's purpose in going to the vacant house, and in spreading his coat upon the porch was to have sexual intercourse. Probably he had reason to believe that the young woman, with whom he had no prior acquaintance, who accompanied him to such place, who lay with him on the coat, who kissed and embraced, had a like purpose. His earlier efforts failed. He tried again with the result that she arose or sat up and threatened to call for an officer. The significance of the threat and the conduct preceding it were for the jury.

Then he struck her. Might not the jury infer that the intent in striking was intercourse by force and against her will? The subsequent acts of defendant may have been in furtherance of such attempt, or perhaps to conceal what then had been done. But he was interrupted by the coming of the automobile. He left and returned to the scene of the crime. That there was no penetration or attempt to penetrate is unimportant. We think the jury might infer reasonably that the theory of the prosecution was correct in fact.

The confession and the other facts and circumstances were sufficient to establish the *corpus delicti.* 68 L. R. A. 33; L. R. A. 1916B, 747; 42 L. R. A. (N. S.) 524; 12 A. L. R. 846; 33 Cyc. p. 1430; *People* v. *Toutant,* 133 Mich. 520; *People* v. *Harrington.* 186 Mich. 482.

4. In the instruction respecting manslaughter it was said, "yet I advise you that there is little evidence touching on this phase of the information." This is assigned as error. If the defendant killed the young woman in an attempt to perpetrate the crime of rape; if he committed the crime charged, for which he was tried, and the jury found that he did, the crime was murder in the first degree. It would not be man-

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slaughter, for a killing in an attempt to rape, which involves an intent to have sexual intercourse by force and against the will, is murder in the first degree under the statute. We think that upon this record the statement was not prejudicial error. See *People* v. *Davis*, 217 Mich. 661; *People* v. *Toner*, 217 Mich. 640.

5. The charge is said to be argumentative and that the trial judge singled out the witnesses by name and gave undue emphasis to the testimony of witnesses for the people. *People* v. *Clarke*, 105 Mich. 169, is cited, but there the charge, though criticized, was not said to be reversible error. *People* v. *Cutler*, 197 Mich. 6, is more like the case at bar, and the charge there was held not to be erroneous. We decline to reverse the case on this ground.

6. Complaint is made of the instruction respecting good character, citing *People* v. *Jassino*, 100 Mich. 536; *People* v. *Van Dam*, 107 Mich. 425; *People* v. *Parker*, 166 Mich. 587; *People* v. *McKeighan*, 205 Mich. 367; *People* v. *Humphrey*, 194 Mich. 10.

The charge on the subject was taken verbatim from *People* v. *Mead*, 50 Mich. 228—opinion by Justice COOLEY—and includes the last two paragraphs there quoted.

Justice COOLEY said that by such charge the right to the benefit of good reputation was not denied, and the jury were told that if the evidence was convincing beyond a reasonable doubt it was their duty to convict notwithstanding the good reputation.

The author of a note, 10 A. L. R. 108, classes the *Mead Case* among "those by which the jury are directed to render verdict against the defendant notwithstanding his good character if upon a consideration of the whole evidence, including that element, they are satisfied beyond a reasonable doubt that he

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is guilty," and he states that instructions of such tenor have been generally sustained.

While the language approved by Justice COOLEY in the *Mead Case* was not as fortunate as that used by him in *People* v. *Garbutt*, 17 Mich. 9 (97 Am. Dec. 162), we think the *Mead Case* should not be classed with those cases in which the jury were told that defendant's good character was of no avail to him, if the evidence, apart from that element, satisfied the jury beyond a reasonable doubt of his guilt, nor with those cases where the jury were told that good character was an element to be considered only in doubtful cases, in which classes fall the cases cited by counsel. And the instructions quoted in the *Mead Case* were held in *People* v. *Parker, supra,* to be "of similar character" to those in the *Garbutt Case,* relied upon by counsel for defendant.

In the case at bar the trial judge gave the two important paragraphs of the *Mead Case,* not one, or one with modifications as was done in some other cases. We do not commend the charge in the *Mead Case,* but we decline now, as we did then, to say that it is reversible error. For criticism of the *Mead Case* see 10 A. L. R. 59.

Writers in some instances have treated good character with much rhetorical flourish. An instruction employing such language might be criticized as giving undue emphasis to the subject. For a request which was approved by this court see *Campbell* v. *People,* 34 Mich. 351, and see *People* v. *Garbutt, supra; People* v. *McAaron,* 121 Mich. 1; *People* v. *Covelesky,* 217 Mich. 90; and for review of Michigan cases upon this subject see 10 A. L. R. 58.

7. The receiving of rebuttal evidence can be justified under the holding of *People* v. *Utter,* 217 Mich. 74. It was not error to deny the motion for a new trial. The

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other questions discussed by counsel have had attention.

8. Consideration of the record, briefs and the earnest arguments of counsel discloses no miscarriage of justice. The identification of defendant was positive. He was the last person to be seen with deceased before the murder. The circumstantial evidence, and the evidence adduced by other witnesses fit with nicety into defendant's confession. He was found near the scene of the murder. He related what was then known to no other person of record, that the light in the home where the deceased roomed could be seen across lots from the porch of the vacant house. It was demonstrated that the light could be so seen. We find no reversible error.

Judgment affirmed.

FELLOWS, C. J., and WIEST, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

VAN DOMMELEN v. VAN DOMMELEN.

1. DIVORCE—"ALIMONY"—DEFINITION.

The word "alimony," though frequently defined as a portion of the husband's estate awarded to the wife for support, does not necessarily imply that he has any tangible property or known available resources from which alimony can presently be realized by legal process; nor is the power of the court to award an allowance so limited.

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2. SAME—ALIMONY FOUNDED ON OBLIGATION OF HUSBAND.
As a recognized incident of divorce, alimony is founded on the continuing obligation assumed by the husband under his contract of marriage to support his wife and children, not based exclusively on his property or estate, but also on his earnings or ability to earn and their necessities.

3. SAME—ABILITY OF HUSBAND RECOGNIZED.
In making an award of alimony, and later in enforcing it, the court is expected and required to have due regard to the ability of the husband, and the character and circumstances of the parties and all other circumstances of the case, and is also required, under 3 Comp. Laws 1915, § 11436, to include a provision in lieu of dower not only in property which the husband then owns but "may thereafter own," or in which he may have an interest.

4. MARRIAGE—DEFINITION.
Marriage is a life contract imposing on the husband support and maintenance of the wife in sickness and in health during life, contingent only on termination sooner by decree of a court for statutory reasons.

5. DIVORCE—EVIDENCE—SUFFICIENCY.
Evidence *held*, to entitle defendant wife to a decree of divorce on her cross-bill.

6. SAME—ALIMONY—EXCESSIVE AWARD—ABUSE OF DISCRETION.
Where the wife was granted a divorce on her cross-bill, a showing that she has a six-months' old nursing child, that she has no property resources, or means of support except as aided by her parents, who are poor and without means, and what she could earn, an allowance of $1,000 in weekly payments of $5 to her, and $3 per week for support of the child, *held*, not so excessive as to amount to an abuse of discretion, although the husband is without property, calling, employment, or income.

Appeal from Superior court of Grand Rapids; Dunham (Major L.), J. Submitted January 19, 1922. (Docket No. 114.) Decided March 30, 1922.

Bill by William Van Dommelen against Johanna Van Dommelen for divorce. Defendant filed a cross-bill asking for a divorce and alimony. From a decree for defendant, plaintiff appeals. Affirmed.

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Paul E. Cholette and *John M. Dunham,* for plaintiff.

Earl F. Phelps, for defendant.

STEERE, J. Plaintiff appeals from a decree of divorce granted defendant on her cross-bill charging extreme cruelty and nonsupport, his especial grievance against said decree being an award to her of $1,000 permanent alimony payable in weekly instalments. The case was heard in the superior court of Grand Rapids upon pleadings and proofs taken in open court on August 23, 1921, at which time both parties testified to being 19 years of age. Plaintiff was then living at the home of his parents and, as he testified, without money, property, trade, employment or income. Defendant was then living at the home of her parents, who were elderly people, without accumulated means, had raised a large family, and were in limited circumstances. She was nursing a baby six months old, of which she testified plaintiff was the father, and had named it Esther June. She had no property, resources or means of support for herself and child, except as aided by her parents and what she could earn as then situated, of which she stated in her verified application for alimony, that—

"before her marriage she worked at the Bissell Carpet Sweeper factory, and that since her baby was born she has been obliged to go back there and work as much as she could, but she has not been able to work all the time and she should not work at all, as the baby is a nursing baby and she should remain with her child."

These young people had known each other for about 2 years when this case was heard. Previous to their marriage she worked in a factory. The only work he is shown to have engaged in was jitney driving. In the spring of 1920 they commenced going together to dances, parks, canoe riding, etc., and soon became intimate. When out together he would accompany her

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home and when absent from the city wrote her letters and postal cards. In the fall it was discovered she was in a delicate condition, for which she claimed he was responsible. Accompanied by her brothers she went to the garage where plaintiff was and advised him of her condition. With his consent she interviewed his mother and the matter culminated in an agreement of marriage.

They were married December 1, 1920, and plaintiff took defendant to his parents' home where they lived together about three weeks. She planned to go to her parents' home during her confinement. This occurred December 25, 1920, earlier than anticipated owing, as she claimed, to a premature birth of the child resulting from his fast driving on a rough trip which they took to Sparta while living together. When indications developed that the event was imminent he took her to her parents' home and, as she claimed, was rough and unkind to her, profanely expressing a wish that her baby would be born dead. He visited her but once after it was born, did nothing for her but return her clothing which she had left at his parents' home, furnished her no support, wholly abandoning her and their child.

On April 18, 1921, plaintiff filed this bill alleging as ground for divorce that he was not the father of her child but under that charge had been deceived and intimidated into marrying defendant. She answered in denial with cross-bill asking for divorce from him and alimony on the ground stated. On the hearing plaintiff admitted improper relations with defendant during the summer of 1920, but claimed they began later than she testified, and too near the time of the baby's birth for it to have been begotten by him.

Upon the hearing it appeared to the court, after listening to the testimony with opportunity to observe the situation generally, and indicated disposition of the

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parties towards each other, that a reconciliation was impossible, that the material facts alleged in plaintiff's bill were not well founded and the same should be dismissed. On the other hand it satisfactorily appeared and was found by the court that plaintiff had been guilty of the several acts of extreme and repeated cruelty charged in defendant's cross-bill, and that she was a proper person to have the care, custody and education of their infant daughter. A decree was rendered accordingly, also requiring plaintiff to pay to the clerk of the court $3 per week for support of the child, and to defendant an allowance to be in lieu of dower and in full satisfaction of all claims against him present and prospective, to a maximum sum of $1,000 in weekly payments of $5 each; but in case she remarry before the same is fully paid, such weekly payments shall cease and the amount then so paid shall stand as full payment of such award to her.

For plaintiff it is contended that this award against a minor, himself without money, property, calling, employment or income from any source, is excessive, unreasonable and under present conditions imposes upon him that which is impossible for him to perform. To that point comparisons are made with other cases in which much smaller awards of alimony have been made against mature men having employment and trades, shown to be earning or capable of earning good wages. The right of the court to make an award of permanent alimony under the facts shown here is also questioned, it being contended that permanent alimony contemplates an award to the wife, according to his resources and her needs, position in life, etc., out of the estate or property owned by the husband.

The word "alimony," though frequently defined as a portion of the husband's estate awarded to the wife for support, does not necessarily imply that he has any tangible property, or known available resources from

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which alimony can presently be realized by legal process. The power of the court to award an allowance is not so limited. Comprehensively considered that term is generally used and understood by the courts and elsewhere as meaning an allowance to be paid by the husband to the wife for her support and maintenance, and often their dependent children, pursuant to an order or decree by the court in a divorce proceeding. As a recognized incident of divorce it is founded on the continuing obligation assumed by the husband under his contract of marriage to support his wife and children, not based exclusively on his property or estate but also on his earnings or ability to earn and their necessities. In making the award, and later in enforcing it, the court is expected and required to have due regard to the ability of the husband, the character and circumstances of the parties and all other circumstances of the case. Though based on existing facts it is largely anticipatory. Significant of the court's jurisdiction to make an allowance in the absence of any visible estate of the husband, the court is required on granting a decree of divorce to include in it a provision in lieu of dower, not only in property which the husband then owns but "may thereafter own," or in which he may have an interest. 3 Comp. Laws 1915, § 11436.

Marriage is a life contract imposing on the husband support and maintenance of the wife in sickness and in health during life, contingent only on termination sooner by decree of a court for statutory reasons. Plaintiff by such a contract assumed that obligation to defendant. The court held, properly we think, that his attempt to repudiate it was ill-founded, and his conduct towards defendant was such as to legally entitle her to the relief asked in her cross-bill. Forced into court on his initiative and compelled by his misconduct to seek divorce she did not lose her marital

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right to support, which under a decree for alimony could be and was made a compulsory contribution under obligations of the marriage contract.

Award of such allowance and its enforcement are two different things. We have before us only the award. These young people yet have their adult life before them, with a life expectancy according to the American tables of mortality of over 42 years. Should plaintiff pay to defendant the allowance granted her of $5 per week to the full amount imposed he would be free for life in a little under four years, or sooner if she re-marry.

We fully concur in the suggestion of defendant's counsel that in awarding to the wife an allowance for support neither a premium upon her immoral conduct with plaintiff before their marriage nor his punishment afterwards should be capitalized as elements of the award, but eliminating all such considerations we are not prepared to find that under the facts disclosed in this case the amount awarded the destitute and deserted wife for her support and maintenance while nursing and caring for their now infant child during the time prescribed is excessive to an abuse of discretion by the trial court.

The decree will stand affirmed, without costs.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and MOORE, JJ., concurred.

The late Justice STONE took no part in this decision.

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GOODLOVE *v.* HAMBURGER.

1. COVENANTS—BUILDING RESTRICTIONS—ABANDONMENT.
   In a subdivision on which there were building restrictions, the change of the location of an alley and a readjustment of the affected lots without any other alteration, *held*, not to amount to an abandonment of the building restrictions.

2. SAME—MERCANTILE BUILDINGS—SERVICE STATIONS.
   A gasoline and oil service station is within the permissive restriction allowing the erection of "mercantile buildings" on a subdivision.

3. SAME—BUILDING RESTRICTIONS—HEIGHT OF BUILDING.
   In a suit by property owners to enjoin the violation of building restrictions on a subdivision, where said restrictions limit the erection of "mercantile buildings" to not less than two stories in height, the fact that defendants' proposed service station, as planned, would look better one-story than two-stories high, *held*, not to entitle them to violate said restrictions against plaintiffs' appeal to the courts for their enforcement.

Appeal from Wayne; Mandell (Henry A.), J. Submitted February 3, 1922. (Docket No. 182.) Decided March 30, 1922.

Bill by William F. Goodlove and others against Charles Hamburger and others to enjoin the violation of certain building restrictions. From the decree rendered, plaintiffs appeal. Modified and affirmed.

Welsh, Bebout & Kahn, for plaintiffs.

Clark, Emmons, Bryant, Klein & Brown, for defendants.

STEERE, J. Plaintiffs, who are property owners and

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residents on Ivanhoe avenue in the Tireman subdivision of the city of Detroit, filed this bill to restrain construction by defendants of a one-story gasoline filling station which they had started on a site in said subdivision located at the southwest intersection, or corner, of Ivanhoe and Grand River avenues. The Tireman subdivision lies adjacent to and extends westerly from Grand River avenue, which runs from the central portion of the city in a northwesterly direction. An alley parallel to it runs through the subdivision a short distance west with lots between the alley and Grand River avenue fronting on the latter, while to the west of the alley lots in the subdivision front on avenues running directly east and west connecting with Grand River avenue at an angle. The names of two of these avenues were subsequently changed from Thornton and Tireman to Spokane and Ivanhoe.

On June 27, 1913, Joseph Tireman and wife, who owned and platted the subdivision, executed and on July 5th recorded in the office of the register of deeds of Wayne county a declaration of building restrictions thereon providing, so far as material here, as follows:

"All lots in the subdivision are to be used for residence purposes only except lots fronting on Grand River avenue on which solid brick mercantile buildings or residences or a combination of both may be erected at a cost of not less than three thousand (3,000) dollars and not less than two stories in height. * * *

"For the entire frontage on Thornton (Spokane) avenue and Tireman place (Ivanhoe avenue) from alley parallel to and westerly of Grand River avenue to the westerly line of the subdivision, no building shall be built, erected or maintained nearer than 30 feet to the front or street line of said premises. * * * No buildings for mercantile or residence purposes shall be erected nearer than twenty feet to the street line of Maplewood avenue, Thornton (Spokane) avenue or Tireman place (Ivanhoe avenue). * * * Thorn-

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ton (Spokane) avenue and Tireman place (Ivanhoe avenue), between Grand River and Beechwood avenues, single residence only, not less than two (2) stories high, costing not less than three thousand (3,000) dollars."

The fact that it was planned to be a strictly residential district with rigid building restrictions was advertised and emphasized as an inducement to purchase. A prospectus used in the sale of lots describing the subdivision in attractive terms pointed out that those restrictions, which would result in freedom from "all objectionable city features," had been put of record, calling attention to a complete copy of the restrictions on the opposite page of the prospectus.

When this suit was commenced the great majority of lots on Ivanhoe and Spokane avenues were occupied with costly residences on both sides, with but a few double houses or family flats in the second and third blocks to the west of Grand River avenue where they were permitted under the restrictions. In the first block next to Grand River avenue only single, two-story dwellings were built on the lots facing those streets. On Ivanhoe avenue there were in the first block approximately 42 expensive residences of an average value of $25,000 or $30,000 and running up to $75,000. It was shown to be a particularly desirable residence district and Ivanhoe was said to be "the best street out Grand River from the Boulevard north as far as you want to go. * * * the most highly restricted street, the most valuable street." The trial judge after viewing the premises found "the streets in this subdivision, as well as others in the immediate vicinity, of a high class residence character," and that Grand River avenue was a busy thoroughfare, "fast becoming a business street."

On August 25, 1919, Mrs. Tireman (whose husband had died) sold to George W. Rudell on contract certain descriptions in this subdivision, amongst which

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were lots on block one facing Grand River avenue, including the site in question, which is a corner lot fronting 50 feet on Grand River avenue and extending westerly that width to the alley with Ivanhoe avenue as a side street on its north. This contract provided:

"The above mentioned premises are conveyed subject to building restrictions recorded in the register's office, Wayne county, Michigan, in liber 914, page 304 of deeds, with the exception that each dwelling erected is to be constructed of solid brick, brick veneer, or stucco, with slate or tile roof and to cost not less than five thousand ($5,000.00) dollars."

On September 10, 1920, Rudell, with the consent of Mrs. Tireman, sold and assigned all his remaining interest in this contract, which yet included the site in question, to defendants Hamburger who on their part obligated themselves over their signatures as follows:

"And the said Max Hamburger and Charles Hamburger, in consideration of the premises hereby assume and agree to carry out all parts of said contract (not already performed), provided in said contract to be performed by the party of the second part thereto."

Early in 1921 (exact date is left blank in printed record) the Hamburgers entered into a land contract with the defendant Standard Oil Company to sell it this site for $24,000 with a payment of $500 down, the latter agreeing as soon as construction could be commenced in the spring to break ground and erect as rapidly as possible a described brick filling station on the premises, and, if all went well in the matter of restrictions, to complete the purchase of said real estate on or before August 1, 1921. The contract is abundant in details, but the following excerpt from its recitals indicates the nature of the project:

"It is understood and agreed that the party of the second part desires to purchase the above described land for the purpose of erecting and conducting a one

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story oil and gasoline filling station for the supply of automobiles and other gasoline driven vehicles, and desires to erect and operate on said land said one story station together with the usual and necessary driveways, and whereas the said real estate is subject to a building restriction providing that lots fronting on Grand River avenue shall be improved by a solid brick mercantile building of two stories in height and cost not less than three thousand dollars ($3,000) and that no building shall be built nearer than twenty (20) feet to the line of said Ivanhoe avenue, and that the parties of the second part are of the opinion that said premises can be used by the party of the second part for the erection and operation of such a gasoline filling station and to give the party of the second part an opportunity to test said question, it is hereby agreed as follows:" * * *

Plaintiffs apparently did not realize any too soon that in some sections eternal vigilance is the price of a building restriction as defendants make the point that the side walls of the filling station were up half way or more when this suit was begun, although the bill was filed and summons issued March 31, 1921. The trial court in its decree refused to enjoin erection of the proposed building, but restricted its extension beyond 20 feet from the curb line of Ivanhoe avenue, including the so-called "canopy," or portico formed by its projecting roof supported on corner piers.

From this plaintiffs appeal, claiming the erection of such structure would be a violation of the building restrictions on that portion of the subdivision in the particulars that the proposed gasoline filling station is not a "mercantile building," is not to be two stories in height, nor to front on Grand River avenue, the canopy or open extension of the roof is an integral part of the building and cannot be separated from it, the oil pumps at the edge of the canopy will be a part of the fixtures of the building, and the proposed cement driveway passing under and outside the canopy covering approximately ¾ of the 20 feet restricted area is

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to be so constructed in connection with the building as to be a permanent part and parcel of it for all intents and purposes.

The defendants contend that the restrictions have become inoperative upon this site by reason of a resubdivision of the tract in 1914; that plaintiffs have violated the restrictions by building within less than 30 feet of the building line on Ivanhoe and Spokane avenues; that the construction of a one-story building instead of a two-story would not injure plaintiffs, but as contemplated would make that corner more attractive; that the proposed building is strictly within the requirements of the restrictions to a "mercantile building" and to be used for legitimate mercantile purposes only, and the concrete driveway objected to is not prohibited by the restrictions but will leave the property much cleaner and more attractive than in its natural condition.

No claim is or can be made that defendants did not have full notice of all restrictions upon this property and all existing conditions in and near that subdivision. Defendants' claim of an abandonment of the restrictions is based on a change of the alley from where first located a short distance further east and nearer Grand River avenue, and a re-adjustment of the affected lots without any other alteration of alleys, streets or lots as previously platted or change in the recorded restrictions placed upon the subdivision. Furthermore, in 1919, when Mrs. Tireman, who lived upon Ivanhoe avenue and was familiar with then existing conditions, sold this property to Rudell she took the precaution to reimpose in the contract the restrictions upon the property sold him, and when he assigned the contract to defendants Hamburger they agreed in writing to carry out all parts of that contract which were to be performed by Rudell. We have no hesitation in concluding that the site in ques-

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tion is subject to the restrictions of record and that this issue should be tested by the legal rights of the parties under them.

Gasoline and oil are well known commodities bought and sold in the usual course of business at wholesale and retail, either exclusively or in connection with other merchandizing. The trial court rightly held that the owner is not prohibited by the restrictions from erecting upon these premises a solid brick mercantile building for that purpose and there engaging in such business. The restrictions, however, in regard to such buildings located upon lots fronting Grand River avenue provide that they "may be erected at a cost of not less than $3,000 and not less than two stories in height." Defendants' contention that the building as planned will look better one story than two stories high does not entitle them to violate that restriction against plaintiffs' appeal to the courts for its enforcement. We find nothing in the restrictions prohibiting cement driveways on the property wherever the owner thinks best. Restriction as to a 20-foot street line on Ivanhoe avenue is in effect reiterated in Mrs. Tireman's contract of sale assigned to defendants Hamburger. No portion of this building or its appurtenances can be extended beyond the prescribed 20-foot building line on that avenue.

This court has so often and recently been called upon to review the authorities on the subject of building restrictions that it would be superfluous to discuss them here. The decree of the lower court will be modified to restrain defendants from erecting upon said site other than a two-story building as specified in the restrictions, and, so modified, will stand affirmed, without costs to either party in this court.

FELLOWS, C. J., and WIEST, CLARK, SHARPE, and MOORE, JJ., concurred. BIRD, J., did not sit.

The late Justice STONE took no part in this decision.

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PEOPLE v. NEMER.

1. CRIMINAL LAW—ARSON — CROSS-EXAMINATION ON IMMATERIAL MATTER—APPEAL AND ERROR.
   In a prosecution for arson in burning a competitor's store, where defendant was a witness in his own behalf, cross-examination with reference to a chattel mortgage, the materiality of which is not apparent, *held*, not reversible error, although it might with propriety have been omitted.

2. SAME—TRIAL—STATEMENT OF PROSECUTOR.
   Where defendant had given evasive answers to the prosecutor's questions, the statement of the prosecutor, after obtaining a direct answer, "Yes. You would like to have them believe that all right. I consider that a distinct victory," *held*, not reversible error.

3. SAME—DUTY OF PROSECUTOR.
   While the prosecuting attorney stands in a somewhat different position than private counsel, the duty being cast upon him of seeing that defendant has a fair trial, yet he is not required to be supine and is entitled to display a reasonable amount of vigor in the trial of a case so long as he does not transgress the rules of conduct required of a public officer in his position.

4. SAME—CHARACTER WITNESS—COLLATERAL ISSUE.
   Where a character witness for defendant, on cross-examination, had stated that he had heard people say that defendant was a crook, refusal to permit him, on redirect-examination, to answer the question "Did you ever hear anything stated upon authority that would back that assertion," *held*, proper; since the question as to whether those who spoke ill of defendant had any foundation in fact for their views was a collateral issue.

5. SAME—OPINION BASED ON PERSONAL DEALINGS INADMISSIBLE—REPUTATION.
   The answer of a character witness, based on his personal dealings with defendant rather than on what other people said of him, *held*, properly stricken out; since reputation is based on "what people say of a man."

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6. SAME—LIMITING NUMBER OF CHARACTER WITNESSES—ABUSE OF DISCRETION.

It being within the discretion of the trial judge to limit the number of character witnesses, in the trial of one accused of arson, it was not an abuse of discretion to limit the number to six.

7. SAME—INSTRUCTION — ARGUMENT OF PROSECUTOR — APPEAL AND ERROR.

An assignment of error attacking the argument of the prosecutor, based on a statement by the trial judge in his charge to the jury that, "the arguments of counsel have been full and fair," *held*, without merit, if prosecutor's argument may be thus attacked.

8. SAME—ACCESSORY—GUILTY KNOWLEDGE—INSTRUCTION.

In a prosecution for arson, where there was testimony that defendant either set the fire himself or procured another to do it, an instruction that "if a person has guilty knowledge of a crime or aids and abets in that crime, but is not an active participant, he becomes a principal in the crime and can be found guilty," *held*, not misleading as giving the jury to understand that defendant was guilty if he knew that the fire was going to be set.

Exceptions before judgment from Ingham; Collingwood (Charles B.), J. Submitted January 13, 1922. (Docket No. 157.) Decided March 30, 1922.

Ellis Nemer was convicted of arson. Affirmed.

D. G. F. Warner, for appellant.

Merlin Wiley, Attorney General, and *J. A. Boice*, Prosecuting Attorney, for the people.

FELLOWS, C. J. Defendant was convicted of arson and reviews the case here on exceptions before sentence. Charles Weller ran a store at Belle Oak in Ingham county. The building was owned by one Simpson. David Nemer, a nephew of defendant, ran another store there. There is a conflict in the testimony as to whether defendant or his nephew owned the store, but if David owned it he was largely indebted to defendant. About 2:30 o'clock in the morn-

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ing of July 22, 1919, the Weller store was burned. It is admitted that the fire was of incendiary origin. There was testimony in the case which would justify the jury in concluding that defendant himself set the fire and they likewise would have been justified in concluding from the testimony that the fire was set by one Mike Bossumer, and there was testimony justifying a conclusion that he was promised $500 by defendant to do the job. At the time of the trial Bossumer was serving a sentence for complicity in the offense, having been convicted on his plea of guilty, and David was under arrest. Both testified on the trial and both implicated defendant as the originator of the plan to burn the store.

Defendant was a witness in his own behalf and several assignments of error deal with what occurred on his cross-examination. The prosecuting attorney was permitted to cross-examine him with reference to a chattel mortgage. We do not perceive the materiality of the evidence sought to be elicited or the harmfulness of the examination. It could have been omitted with propriety but permitting it was not reversible error. Some questions were asked, the answers to which were self-evident. They were doubtless prompted by the evasiveness of defendant in replying to the prosecutor's questions. On one occasion the prosecuting attorney, after obtaining a direct answer, said:

"*Q.* Yes. You would like to have them believe that all right. I consider that a distinct victory."

Error is assigned on this statement. Much space is devoted in the briefs to this incident, in fact, more than it deserves. Defendant's counsel insists that it was innuendo aimed at defendant while the prosecutor insists it was but the expression of satisfaction upon receiving a direct answer to one of his questions. We will not settle this controversy between counsel as we

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do not think the remark constituted reversible error. While it is true as contended by defendant's counsel that the prosecuting attorney stands in a somewhat different position than private counsel and in the trial of a case has the duty cast upon him of seeing that defendant has a fair trial he is not required to be supine, nor is he required to apologetically present the people's case. He is entitled to display a reasonable amount of vigor in the trial of a case, and, unless he transgresses the rules of conduct his position as a public officer requires, should not be condemned by this court. This assignment of error is without merit.

Defendant sought by so-called character testimony to establish his good reputation as a law-abiding, upright, honest citizen. It is evident from this record that his counsel was somewhat disappointed in the evidence elicited from some of the witnesses who testified on this subject. One of the witnesses on cross-examination demonstrated that he was basing his opinion on his dealings with defendant and not upon what others spoke of him, and on such cross-examination testified that he had heard people say that defendant was a crook. On redirect-examination defendant's counsel asked him:

"*Q.* Now, just a moment. What you have heard people say, did you ever hear anything stated upon authority that would back that assertion?
"*A.* No, sir."

This answer was stricken out as was the opinion of this witness based on his personal dealings with defendant. We think these rulings were proper. It was the avowed purpose of defendant's counsel to establish as a fact that defendant's dealings with the witness were honest, and that those who spoke ill of defendant could not "back" their "assertions" with proof. Reputation is based on the "speech of people," "what people say of a man." People may or may not

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correctly measure their fellowmen. This character of testimony is of importance in criminal trials, and evidence of the good reputation of a defendant as a law-abiding, honest citizen is always received, but this does not permit him to try out the collateral issue that all who speak against him in the community have no foundation in fact for their views. Mr. Wharton in dealing with so-called character testimony says (1 Wharton's Criminal Evidence [10th Ed.], § 58):

"Character, in the sense in which the term is used in jurisprudence, means the estimate attached to the individual by the community, not the real qualities of the individual, as conceived by the witness. It is not what the individual really is, but what he is reputed to be, generally, by the society and the community in which he moves and resides. So, a witness called to speak as to character cannot give the results of his own personal experience and observation, or express his own opinion, but he is confined to evidence of general reputation in the community where the defendant resides or does business. Such a witness, so confined to general reputation, may be examined for the purpose of testing his opportunities of ascertaining that reputation."

The rulings of the trial judge were in consonance with these views.

The trial judge limited the number of character witnesses to six and error is assigned on this action. Neither counsel has called to our attention a case in this court where the precise question was involved. In *Barhyte* v. *Summers*, 68 Mich. 341, this court held that it was error to limit the number of witnesses testifying to the condition of a mare, that being the "vital point" in issue. In *Sulkowski* v. *Zynda*, 160 Mich. 7 (136 Am. St. Rep. 414), it was held to be error to limit the number of witnesses on the question of whether plaintiff's speech was affected before the injury, where that question was the material and disputed issue. In *Riggs* v. *Sterling*, 60 Mich. 643 (1

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Am. St. Rep. 554), the power of the court to limit the number of witnesses on the question of value, a matter of opinion, was recognized, and the limiting of the number to six held not to be an abuse of discretion; and in *Detroit City Ry.* v. *Mills*, 85 Mich. 634, where the court limited the number of witnesses to the use of the street and the effect of adopting electricity as a motive power for street cars, Mr. Justice GRANT said:

"Defendants' counsel announced that they had a large number of witnesses to the same effect, and asked permission to call two or three more. The court said that five or six witnesses to any particular fact was sufficient, and that it was clearly within its discretion to limit the number of witnesses; that as to the points already covered defendants would not be permitted to call more witnesses, but as to any new facts they might call more. The circuit judge was clearly right in this exercise of his discretion."

Mr. Wigmore in his work on Evidence (Vol. 3, § 1908) has this to say of character evidence:

"The value of character-evidence, impeaching or sustaining a party or a witness, is commonly much exaggerated; its comparative futility in the ordinary case, and its tendency to degenerate into a mere exhibition of petty local jealousies and animosities, of no real probative service, have induced the courts to concede unanimously that the number of character-witnesses may without disadvantage be limited, as the trial court may prescribe."

While we may not approve all the reasons given by Mr. Wigmore for limiting the number of character witnesses, his announcement of the power of the court and the unanimity of decision on the subject is of persuading force. The supreme court of Illinois is in accord with this court in holding that the number of witnesses as to the controlling fact may not be limited, but that court expressly holds that the number of character witnesses may be limited by the trial judge.

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In *People* v. *Arnold*, 248 Ill. 169 (93 N. E. 786), it was held (we quote from the syllabus):

"The trial court has no power to limit the number of witnesses to be heard on a side as to a controlling fact or facts and circumstances bearing thereon, but it is not error to fix a reasonable limit concerning collateral matters, such as evidence of the good character of one accused of rape."

See, also, *State* v. *Miles*, 253 Mo. 427 (161 S. W. 766); *People* v. *Casselman*, 10 Cal. App. 234 (101 Pac. 693); *State* v. *Albanes*, 109 Me. 199 (83 Atl. 548). The members of this court well remember that it has been the universal practice in the courts of this State to limit the number of character witnesses. The practice has been so universal and of such long standing that it has not been questioned until this case. An examination of the authorities discloses that the practice is general. The power to limit was in the trial judge. We do not think he abused it in the instant case.

No objections were made to the argument of the prosecuting attorney, nor were any requests preferred on the subject. The trial judge in his charge said:

"The arguments of counsel have been full and fair."

Defendant's counsel assigns error on this and calls attention to numerous excerpts of the prosecuting attorney's argument which he insists should not have been made. It is very doubtful if counsel may thus attack the argument of the prosecuting attorney. But a reading of the argument of the prosecutor which covers some 18 pages of the record convinces us that we should agree with the trial judge. While there may be a sentence here and there that might have been omitted, taken as a whole it fairly presented the case to the jury. If it was harmful to defendant it was because it marshalled the facts of the case which were established by the evidence with convincing force.

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The trial judge instructed the jury:

"Ellis Nemer is charged with arson and the crime of arson has been defined to you. Under our law, if a person has guilty knowledge of a crime or aids and abets in that crime, but is not active participant he becomes a principal in the crime and can be found guilty. Such is called an accessory before the fact. If he has guilty knowledge of that fact beforehand or if he aids or abets in it but is not present at the time of the crime, then he becomes a principal, and you, if the evidence convinces you of that beyond a reasonable doubt, you can find him guilty."

Defendant's counsel assigns error on this instruction. He insists that it gave the jury to understand that if defendant knew the fire was going to be set he was an accessory before the fact and guilty as principal. We can not follow defendant's counsel in this contention. It overlooks the fact that the word "guilty" precedes the word "knowledge" in each instance. As applied to the peculiar facts of this case we do not think the defendant was prejudiced by the instruction. It was the claim of the people that defendant asked Bossumer to set the fire and offered him $500 if he would do so. Both Bossumer and David Nemer so testified. Defendant denied this and denied he had any knowledge the fire was going to be set. Upon this record either defendant had no knowledge the fire was going to be set or he had the knowledge of a co-conspirator, a guilty knowledge. Under these circumstances it is difficult to perceive how the jury could have been in any way misled by this instruction.

Finding no reversible error the conviction is affirmed, and the case remanded with instructions to proceed to judgment.

WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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MURPHY v. BONEWELL.

APPEAL AND ERROR — EXCEPTIONS TO FINDINGS — CIRCUIT COURT RULE—ASSIGNMENT OF ERROR—REVIEW.

Where, in a case tried before the court without a jury, no exceptions were filed to the findings of the court in compliance with Circuit Court Rule No. 45 and 3 Comp. Laws 1915, § 12587, and there is no assignment of error that the findings do not support the judgment or that they are against the weight of the evidence, the Supreme Court has no other duty than to affirm the judgment.

Error to Wayne; Root (Jesse H.), J., presiding. Submitted February 3, 1922. (Docket No. 24.) Decided March 30, 1922.

Assumpsit in justice's court by James R. Murphy against William L. Bonewell for money had and received. There was judgment for plaintiff, and defendant appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

Millis, Streeter, Murphy & Berns, for appellant.

David N. Harper, for appellee.

FELLOWS, C. J. This case was tried by the court without a jury. No points of law were presented. No request for finding of facts was filed. Judgment was rendered for the plaintiff March 18, 1921. The trial judge states that several weeks later he was requested to file written findings of law and facts. This probably was an oral request as no request of such character was filed. The trial judge complied with such request and findings were filed May 6th. No exceptions to them were filed and no

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extension of time was asked for or granted in which to file them or to propose amendments to them. July 6th without leave of the court proposed amendments were filed. In the main they were denied August 8th and on August 10th exceptions to the refusal to amend were filed and exceptions to certain findings were included. This was nearly five months after the judgment was entered. There is no assignment of error that the findings do not support the judgment or that they are against the weight of the evidence.

In this court counsel for the appellee insists that inasmuch as there has been no compliance with the provisions of Circuit Court Rule No. 45 and the statute (3 Comp. Laws 1915, § 12587), there is nothing before us for review. This court has in numerous cases pointed out the necessity of following the required practice in order to save questions for review in this court. Among the recent cases, see *Silfver* v. *Daenzer*, 167 Mich. 362; *Cascarelli* v. *Railroad Co.*, 202 Mich. 304; *Engel* v. *Tate*, 203 Mich. 679; *Messer* v. *Dornbos*, 210 Mich. 46; *Northern Assurance Co.* v. *Houghton Circuit Judge*, 169 Mich. 238, and especially *Federal Audit Co.* v. *Sawyer*, 196 Mich. 566, where earlier authorities are cited and quoted from. As the rule fixes the requirements prerequisite to a review of the case in this court, our jurisdiction is dependent on a substantial compliance with such requirements. In the instant case there has not been a substantial compliance with the rule and our attention has been challenged to the failure. Under these circumstances, we have no other duty than to affirm the judgment.

WIEST, CLARK, SHARPE, MOORE, and STEERE, JJ., concurred. BIRD, J., did not sit.

The late Justice STONE took no part in this decision.

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HAMBURGER v. BANK OF DETROIT.

1. APPEAL AND ERROR—SUPREME COURT NOT TRIER OF FACTS—EVIDENCE—WEIGHT OF EVIDENCE.
   The Supreme Court is not the trier of the facts in law cases brought before it for review, but, under 3 Comp. Laws 1915, § 12587, if satisfied that the findings of the trial judge are against the clear weight of the evidence, reversal is authorized.

2. BANKS AND BANKING—FINDING JUSTIFIED BY EVIDENCE.
   In an action against a bank for the breach of a contract to pay out money only on checks signed and countersigned according to agreement, the finding of the court in favor of plaintiff, *held*, justified by the record.

3. SAME—EVIDENCE—BURDEN OF PROOF—WEIGHT OF EVIDENCE.
   The burden of proof being upon defendant to establish its claim that plaintiff had accepted another as her debtor, and should apply certain moneys collected by her upon the transaction in question, the finding of the court in favor of plaintiff, *held*, not manifestly against the clear weight of the evidence.

4. SAME—CONTRACT—BREACH OF CONTRACT—RIGHT OF ACTION.
   Where plaintiff made a special deposit with defendant bank in the name of E. Company, under an agreement that the money should be paid out only on checks signed by E. and countersigned by H., payment of the money on checks signed by E. alone, resulting in loss to plaintiff, *held*, to authorize an action by plaintiff.

5. SAME—PARTIES.
   Plaintiff and defendant being the contracting parties, in an action on the breach of the contract E. Company was not a necessary party.

6. CORPORATIONS—ASSUMED NAME—STATUTES.
   Plaintiff, having contracted with defendant in her own name, was not doing business under an assumed name, and therefore is not prevented from recovering for breach of the contract by reason of her failure to comply with

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the statutes in regard to doing business under an assumed name (2 Comp. Laws 1915, § 6349 *et seq.*, as amended by Act No. 263, Pub. Acts 1919; 2 Comp. Laws 1915, § 6354 *et seq.*).

Error to Wayne; Dingeman (Harry J.), J. Submitted January 10, 1922. (Docket No. 72.) Decided March 30, 1922.

Assumpsit by Anna Hamburger against the Bank of Detroit for the amount of certain deposits. Judgment for plaintiff. Defendant brings error. Affirmed.

Anderson, Wilcox, Lacy & Lawson, for appellant.

Morris Garvett, for appellee.

FELLOWS, C. J. It is the claim of plaintiff in this case that one Fred A. Engel, her son-in-law, was conducting a small electrical contracting business in Detroit and that it was contemplated that a corporation should be organized to take over such business, plaintiff Engel and plaintiff's nephew, an attorney, Leon H. Hamburger, to be the stockholders. The corporation was to be named Fred A. Engel Company, that being the name under which he was doing business. It is her claim that Engel was then largely indebted to her. It was contemplated that she was to put into the corporation approximately $2,000. Leon H. Hamburger, who acted as plaintiff's attorney in this and other matters, testifies in substance that he explained fully to a Mr. Briggs, an officer of the defendant bank, the situation, told him the money belonged to plaintiff and made an agreement with the bank that plaintiff's money should be deposited in the name of Fred A. Engel Company, to be paid out only on checks signed by Fred A. Engel and countersigned by him, Hamburger, he and said Engel to be the officers of the contemplated company. The plans to organize

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the corporation were abandoned, and shortly thereafter it was learned that defendant had paid out the money, or practically all of it, on checks not countersigned by Leon H. Hamburger. Defendant denied that the money was deposited with it under the arrangement claimed by plaintiff. It also claims that plaintiff accepted a note from Engel to satisfy her claim against defendant and that she collected some money from Engel which should be applied on her claim against defendant. Plaintiff denies that she accepted any note of Engel for such purpose and claims that the money she received from Engel was payment in part only of his indebtedness to her.

Plaintiff brings this action counting on her claimed contract, and alleging its breach by defendant. The case was tried without a jury and findings of facts were filed by the trial judge sustaining plaintiff's claim. He concluded as matter of law that plaintiff was entitled to recover and judgment followed. Defendant brings the case here claiming that the findings of facts are against the weight of the evidence and that there are insuperable legal objections to plaintiff's right to recover.

As we have had occasion to point out many times, we are not the triers of the facts in cases on the law side of the court brought to this court for review. If we are satisfied that the findings of the trial judge are against the clear weight of the evidence, we are authorized to reyerse under section 12587, 3 Comp. Laws 1915. But we do not hear law cases *de novo*. An examination of this record convinces us that we should not disturb the findings of fact. Upon the question of what the contract between the parties actually was the preponderance of the evidence is clearly with the plaintiff. Mr. Hamburger, who acted as plaintiff's attorney in the transaction, sustains her claim. Another witness who was present when the

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arrangement was made corroborates him in the material matters although he does not testify as fully as does Mr. Hamburger. Mr. Briggs, who acted for the bank, qualifies his testimony in behalf of the bank's claim by frequently using the expression "to the best of my knowledge and belief." Upon the question of whether plaintiff accepted Engel as her debtor and should apply certain moneys collected by her on this transaction, the testimony is not so clear. Upon this question the burden was upon the defendant. Bearing in mind, however, the rule that the findings must be manifestly against the clear weight of the evidence, we are not persuaded that we should disturb the conclusions of the trial judge on this question. All parties seem to agree that what was done in this regard was for the purpose, as expressed by them, of "ironing out" the situation. It is evident that an attempt was made to save both the bank and plaintiff from loss, and it is also evident that the attempt was unsuccessful. From some of the testimony it appears that the assignment to plaintiff executed by Engel of indebtedness due him was before this difficulty arose, and was made to pay old debts of his to plaintiff. The trial judge had the advantage of seeing and hearing the witnesses and we are not persuaded that he reached erroneous conclusions upon the disputed questions of fact.

This brings us to the legal objections urged by defendant's counsel to the plaintiff's right to recover. Upon the main question in the case counsel for both parties fully consider the case of *Davis* v. *Savings Bank*, 53 Mich. 163. In that case plaintiff was carrying an account with defendant in his name but the money belonged to his mother. He desired to carry an account of his own funds and it was arranged that he should do so, using his wife's name for such account. Pursuant to this arrangement he deposited

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his money from time to time in the name of his wife. Upon her death the bank refused to recognize his right to the money and he brought suit. It was held that he could maintain the action. Mr. Justice CAMPBELL, speaking for the court, there said:

"The contract of a depositor with his banker does not differ in any material way from any other contract, whereby one person becomes bound to take charge of and repay another's funds. As between banker and depositor, there can be no doubt that the bank will be protected in paying out money in such way and on such terms as the depositor has authorized. And, on the other hand, where a contract is not in writing, it is equally clear that its real character and terms may be made out by testimony, and that the contracting party can lawfully control his own funds until he has disposed of them and that it can make no difference in what name the account is kept, if it is understood to be his account, and has not been put beyond his control by some act which he cannot revoke.

"In the present case the testimony does not tend to show that the bank ever contracted with anybody but plaintiff, or received funds on this account which were not his funds. The case he made out, and which the jury must have found true, was that, while deposited in the wife's name, it was not intended to be for her benefit, or to be beyond the husband's right to withdraw. Any idea of a gift to her was clearly negatived. Her name was only another form for his name, and so agreed. The bank-book is no contract, and is only one of the means of indicating the state of the funds. Whatever presumptions may arise from it, and whatever protection may be given to acts innocently done on that presumption, it cannot exclude explanatory evidence. The contract was made with plaintiff, and with no one else, and the bank is answerable to him to fulfill that contract."

This case is absolutely controlling of the one before us. Plaintiff under the facts as found by the trial judge deposited her money in defendant bank

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in the name of Fred A. Engel Company under an express agreement that it should only be withdrawn on checks signed by Fred A. Engel and countersigned by Leon H. Hamburger. Defendant has breached the contract under which the money was deposited and has paid out the money on checks not so countersigned. Plaintiff's right of recovery is clear under the authority of the *Davis Case.*

It is also insisted that plaintiff can not recover because Fred A. Engel Company was not made a party. This likewise is answered by the *Davis Case,* where it was said:

"The suggestion that the estate of Mrs. Davis is not represented in the cause has no force. In every action at law upon a contract the contest must be between the two alleged contracting parties, and if the contract and its breach are made out, the prevailing party must have judgment. The case is in our opinion, a very plain one."

Defendant's counsel also contend that plaintiff can not recover because she was doing business under an assumed name within the meaning of the statutes, citing Act No. 101, Pub. Acts 1907 (2 Comp. Laws 1915, § 6349 *et seq.*), as amended by Act No. 263, Pub. Acts 1919, and Act No. 164, Pub. Acts 1913 (2 Comp. Laws 1915, § 6354 *et seq.*). A complete answer to this contention will be found in the facts. Plaintiff, acting through her attorney, in her own name made a contract with defendant for the deposit of her own funds in the bank to be withdrawn only on certain conditions. The statute did not prohibit her from contracting in her own name. *Rossello* v. *Trella,* 206 Mich. 20. This she did. The contract with the bank was the contract of the plaintiff, not the contract of the Fred A. Engel Company. The money deposited was the money of the plaintiff, not the money of Fred A. Engel Company. Under the

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contract it did not become the money of Fred A. Engel Company upon the deposit being made and not until a corporation by the name was organized (which was never done), and then it was to be withdrawn only upon the agreed conditions. The contract here, being the contract of the plaintiff in her own name, was not inhibited by the statute.

What we have just said disposes of defendant's contention that the failure of the parties to organize the company made them in law a partnership and Engel and Leon H. Hamburger should be joined as plaintiffs. Defendant dealt and contracted alone with plaintiff. It breached its contract with her, and to her alone must it respond.

The judgment will be affirmed.

WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

SEIFFERLEIN *v.* FOERSTER.

1. EVIDENCE — WITNESSES — INTERESTED WITNESSES — WEIGHT OF TESTIMONY.

The testimony of interested witnesses should be weighed with that fact in mind.

2. APPEAL AND ERROR — DE NOVO — VIEWS OF TRIAL JUDGE TO BE CONSIDERED.

While the Supreme Court hears chancery cases *de novo*, and is not controlled by the views of the trial judge, his

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On right of one in permissive possession of real property to acquire title by adverse possession, see note in 12 L. R. A. (N. S.) 1140.

On hostility as essential element in adverse possession, see note in 15 L. R. A. (N. S.) 1192.

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findings on disputed facts are not to be overlooked, and in close cases his views are very helpful.

3. ADVERSE POSSESSION—EVIDENCE—FINDINGS OF COURT SUPPORTED.
In a suit to set aside certain deeds and to quiet title to land, where plaintiff claimed that defendants and their grantor worked said land under an agreement with her deceased husband, and defendants claimed title by adverse possession, the findings of the trial court on the disputed facts in favor of plaintiff, *held*, to be supported by the record.

4. SAME—PERMISSIVE POSSESSION NOT ADVERSE.
Permissive possession does not ripen into title by adverse possession; but possession to be adverse must be hostile in addition to being actual, continued, visible, notorious, and distinct, and it must be established by clear and cogent proof.

5. SAME—HOSTILE POSSESSION NOT SHOWN.
Where the proofs establish that defendants' possession was not hostile, their claim of title by adverse possession must fail.

6. SAME—EVIDENCE—ADMISSIBILITY.
Testimony by defendants' grantor that he worked the land in dispute under an arrangement with plaintiff's deceased husband was admissible where it was shown that knowledge of said arrangement was brought home to defendants.

7. SAME—TAX RECEIPTS ADMISSIBLE—INTENT.
Tax receipts showing that plaintiff's husband paid the taxes on said land until his death, and that later plaintiff paid them, *held*, admissible for their bearing on the question of defendants' intention during those years to claim title.

Appeal from Macomb; Barton (Joseph), J., presiding. Submitted February 7, 1922. (Docket No. 88.) Decided March 30, 1922.

Bill by Emma Seifferlein against John C. Foerster and others to set aside certain deeds and to quiet title to land. Defendants filed a cross-bill, asking affirmative relief. From a decree for plaintiff, defendants appeal. Affirmed.

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Lungerhausen, Weeks & Lungerhausen and *Neil E. Reid,* for plaintiff.

Harrison Geer, for defendants.

FELLOWS, C. J. On October 28, 1874, Louis Seifferlein acquired title to the west half of the west half of the northeast quarter of section 35, township of Warren, Macomb county. On December 24, 1872, John Michael Seifferlein and his wife, Emiline, acquired title to 20 acres adjoining this 40 on the west. It would appear, although the deed is not in the record, that they then owned the 20 acres on the west of this 20, so that they owned a long 40. Louis Seifferlein was the husband of the plaintiff and John Michael Seifferlein was his uncle. The Grand Trunk railway ran diagonally through these two 40's, cutting off a triangular piece in the northwest corner of the 40 then owned by Louis. This triangular piece fronted on the highway and adjoined lands cropped by John Michael. After these parties had acquired their title, and probably about 1880, they entered into an arrangement that John Michael should work this triangular piece and Louis should work an equal amount of John Michael's land, and with a tape line they measured off a triangular piece of land on John Michael's 40 adjoining Louis' land which he was to work. This arrangement was made to save the inconvenience and hazard of crossing the railroad. While defendants claim in their answer that this agreement was an agreement to exchange titles to these triangular pieces of land there is no testimony to support such claim and all the testimony shows that the possession by each of the other's triangular piece was permissive only. Defendants' Exhibit 1 shows the situation and is quite necessary to its understanding, and we, therefore, make it a part of the opinion. These triangular pieces are designated on the exhibit as "easterly tri-

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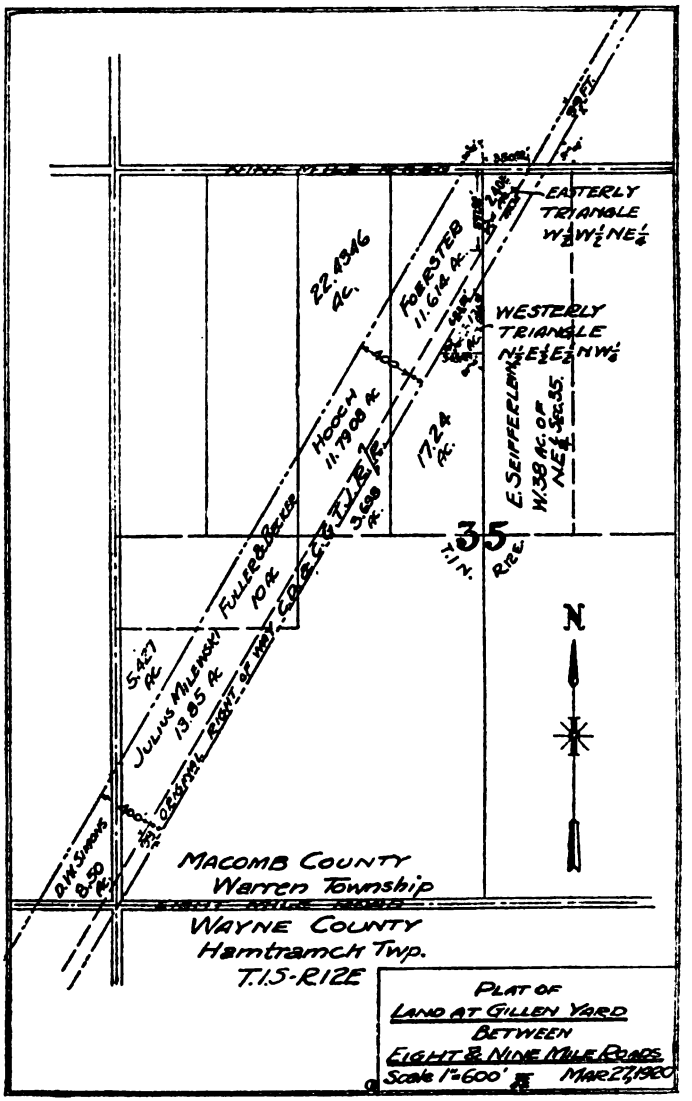

angle" and "westerly triangle." But the witnesses speak of them as the "north" and "south" triangles and they will be so designated in this opinion.

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On March 29, 1892, John Michael Seifferlein conveyed his 40 to John C. Foerster. He did not include in his deed the north triangle nor did he except the south triangle. On March 27, 1912, John C. Foerster and his wife entered into a contract with their son Alfred to sell him their 40. This contract likewise did not include the north triangle nor did it except the south triangle. By 1916 the north triangle had become valuable and was desired by the Grand Trunk for the purpose of extending its yards. On March 6th, John C. Foerster and wife conveyed to their son Alfred and wife by warranty deed their 40 from which they excepted the south triangle with a recital in the deed that it had been exchanged for the other triangle. On the same day Foerster and wife executed a quitclaim deed to their son and his wife of the north triangle. In the same month Alfred and wife conveyed the north triangle to a representative of the Grand Trunk.

Louis Seifferlein is now deceased. Before his death and in the spring of 1915 he placed the title to his 40 in himself and wife as tenants by the entirety and she now claims title as survivor. From the making of the arrangement in 1880 down to and including the year 1915 and until about the time the Grand Trunk sought to acquire the north triangle, it was worked in connection with the John Michael Seifferlein 40 and the south triangle was worked in connection with the Louis Seifferlein 40. Early in 1916, the Foersters, father and son, called on plaintiff, her husband being then deceased. The detail of their conversation is in dispute. Mr. Foerster then claimed to own the north triangle by adverse possession. There is no testimony that he had before this time made such claim to either plaintiff or to her husband before his death; Mr. Foerster was evidently willing to give something to clear up the title. Plaintiff claims that

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at this conversation he admitted that at the time he bought his 40 he talked about the triangle with her husband and they agreed to leave it as it was. The Foersters deny this part of the conversation. Defendants' counsel makes much of the fact that plaintiff did not recall this part of the conversation until after a recess when she was again called to the stand. We do not attach much significance to this as Mr. Foerster did not make any denial of it when he was first upon the stand and made his denial of it when he likewise was recalled to the stand. All of these parties were interested and their testimony should be weighed with that in mind. Plaintiff, however, called a Mr. Jarvis, who, so far as this record discloses, was absolutely disinterested. He worked for Alfred Foerster in 1914 on the Foerster farm. This was after Alfred had bought the place of his father on the contract. He testifies that he asked Alfred about the crook in the fence, having reference to the north triangle, and that Alfred informed him that "Seifferleins always worked our corner on that side and we worked their corner on this side, to save crossing the railroad." Alfred Foerster does not deny having this conversation with Mr. Jarvis. It strongly sustains the plaintiff's contention. The trial judge who heard and saw the witnesses found the facts to be with the plaintiff. While we hear chancery cases *de novo* and are not controlled by the views of the trial judge, his findings on disputed facts are not to be overlooked and in close cases his views are very helpful. We are satisfied in the instant case that he correctly measured the credibility of the witnesses and that his conclusions on the disputed facts should not be disturbed.

Let us restate the facts we find established: John Michael Seifferlein and his nephew Louis Seifferlein owned adjoining 40's, both traversed by the Grand

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Trunk. A triangular piece of about 2½ acres was cut off from the balance of Louis' farm by the railroad; it was convenient for John Michael to work this piece of land; it was inconvenient for Louis; they arranged that John Michael should work it, and that Louis should work an equal amount of land belonging to his uncle, and it was measured off; this saved each from crossing the railroad in their work. When Foerster bought of John Michael he talked with Louis and they agreed to continue the arrangement. As late as 1914 each was working a triangular piece of land belonging to the other and each recognized the other's title. Indeed, it was not until after Louis' death, and when the land had greatly increased in value, that notice was brought home to plaintiff that the Foersters claimed title.

Upon these facts no difficult questions of law arise. This court has spoken so many times on the subject that we need not again review the authorities. Permissive possession so long as continued does not ripen into title by adverse possession; possession to be adverse must be hostile in addition to being actual, continued, visible, notorious and distinct, and it must be established by clear and cogent proof. It is not established in the instant case, but on the contrary the proofs establish that it was not hostile, therefore not adverse.

Two questions are raised on the admissibility of testimony which should be considered. John Michael Seifferlein was called to establish the arrangement between him and his nephew Louis. Counsel for defendant most strenuously urged that the testimony should not be received against the defendant Foerster, the arrangement not being with him and not binding on him. We think plaintiff's counsel pursued the orderly course. He proved (1) that the arrangement was made, and (2) that it was brought

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home to Mr. Foerster. The other objection relates to the admission of tax receipts showing that Louis paid the taxes from 1886 until his death and that later his wife paid the taxes. We think they were properly received in evidence. In *Croze* v. *Quincy Mining Co.*, 199 Mich. 515, this court said:

"If defendant had in good faith intended to claim the entire title it is difficult to understand why it should have permitted one-third of the premises to be assessed to plaintiff and his predecessors for 15 years, knowing, as it must have, that when they paid the taxes they did so in the belief that they were the undisputed owners thereof. The fact that defendant permitted this to be done for 15 years is very persuasive that it did not intend, during that time, to claim the entire title. While it is not conclusive of the intent, it is a circumstance to be taken into consideration in determining defendant's intention" (citing authorities).

It follows from what has been said that the decree must be affirmed. Plaintiff will recover costs of this court.

WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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GREGOR *v.* OLDE.

1. SPECIFIC PERFORMANCE—EVIDENCE—SUFFICIENCY.
   In a suit for the specific performance of a land contract, evidence *held*, sufficient to show that plaintiff and her husband had paid a considerable sum in excess of the purchase price, and the cost of improvements and taxes paid by defendants, and therefore was entitled to a deed.

2. JUDGMENT—RES ADJUDICATA—BURDEN OF PROOF.
   The burden of establishing the defense of *res adjudicata* was upon defendants.

3. SAME—EVIDENCE—SUFFICIENCY.
   An unsigned notation on the file of a case before a circuit court commissioner that judgment had been entered, with testimony from the clerk that the commissioner said it was in his handwriting, *held*, insufficient to establish a judgment and sustain the defense of *res adjudicata*.

4. SPECIFIC PERFORMANCE—JUDICIAL DISCRETION — ARBITRARY REFUSAL OF RELIEF.
   While the granting of relief by specific performance rests largely in the discretion of the court, that discretion is judicial, and where a proper case is made out by the proofs such relief may not be arbitrarily refused.

5. SAME—LACHES—EQUITABLE ESTOPPEL.
   Where plaintiff many times asked for an accounting from defendants, which was not given her, they may not complain of her laches or invoke the doctrine of equitable estoppel because she continued to pay after paying all that she owed them.

Appeal from Wayne; Goff (John H.), J. Submitted January 26, 1922. (Docket No. 108.) Decided March 30, 1922.

Bill by Louisa Gregor against Ernest J. Olde, Jr., and others for the specific performance of a land con-

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tract and for an accounting. From a decree for plaintiff, defendants appeal. Affirmed.

Robert M. Dalton (*Fritz L. Radford*, of counsel), for plaintiff.

Finkelston & Lovejoy and *H. C. Chilson*, for defendants.

FELLOWS, C. J. This case was here on the question of the sufficiency of the bill in *Gregor* v. *Olde*, 209 Mich. 43. We there reversed a decree granting a motion to dismiss. Shortly after the decree dismissing the bill was entered in the court below and before the case was submitted to this court, defendant Olde sold the premises on land contract to Israel Prevost and Emma Prevost, husband and wife. Upon the case being remanded a supplemental bill was filed making them parties. The case went to a hearing on the merits and the trial judge found the facts to be with plaintiff and entered a decree in accordance with the prayer of the bill. The details of the decree will be presently referred to.

The testimony in this record strongly preponderates in favor of the plaintiff's claim. On June 2, 1902, the father of defendant Olde entered into a land contract with plaintiff and her husband, Rudolph Gregor, to sell them the premises in question. The purchase price was $1,400, the payments were to be $8 every two weeks until the purchase price was paid with 6 per cent. interest. It is the claim of the plaintiff that during the lifetime of her husband he furnished the money and that after his death she and the children furnished the money to make the payments and that they have been regularly made, and that frequently larger sums than the regular payments were made. It is her claim that she has paid much more than she should have paid and is, and long ago was, entitled to a deed of the premises. Defendants, on the other

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hand, claim that the payments were not regularly made; they also claim that Mr. Olde, Sr., while he was active and looking after his business, and thereafter defendant Olde who succeeded him in title, always paid the taxes on the premises, paid for improvements, and they claim that there is much more due on the contract than the original purchase price. Elaborate computations made by both counsel are found in the record in which their respective claims as to amounts paid and amounts due are set out at length. These computations have been carefully considered and we have spent considerable time examining the account books which defendants' counsel earnestly insist were competent evidence. The account books are not very helpful and we do not think them controlling in view of the testimony that on many occasions Mr. Olde made a memorandum of the money paid on a strip of paper instead of on the small account books he sometimes carried in his pocket. We need not review these computations or the account books but will proceed as briefly as possible to point out the testimony that is convincing to us that the facts are with the plaintiff. Both parties labored under some disadvantages in presenting their claims to the court. Mr. Olde, Sr., had been stricken with apoplexy and could not give his testimony. However, his son Walter E. Olde, who made the collections from 1906 down to June, 1918, was called as a witness and gave testimony favorable to defendants' contention. Plaintiff's copy of the contract had been stolen after her husband's death, so she could not produce the indorsements made on it and a paper attached to it for that purpose.

Plaintiff's husband died in July, 1912. Several of plaintiff's children, who were then attending school, testify that in April of that year they and their father, who was then ill and about to undergo an operation, added up the sums which had been paid on the contract and indorsed by the Oldes on a paper attached

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thereto, and that the amount so paid and so indorsed was over $2,400 and less than $2,500. They do not undertake to give the exact figure. Plaintiff testifies that the computation was made but she does not claim to have participated in it. While this testimony comes from plaintiff and members of her family, we are satisfied they are telling the truth. After Mr. Gregor's death Mr. Olde did not call for payments on the contract until the following September, when plaintiff claims payments were resumed and kept up regularly. When plaintiff's son reached the age of 16 he commenced work at $50 per month, which he says was turned over to his mother and a part of which was paid on the contract. When one of the girls went to work she likewise assisted from her wages in making payments on the contract during 1916, 1917 and 1918. During all this time plaintiff was unsuccessfully trying to get an accounting from defendant Olde.

After Mr. Gregor's death plaintiff was advised to apply for a mother's pension; this she did but the matter seems to have been delayed for several years. Finally Probate Judge Hulbert took the matter up. In order to find out her financial condition he wrote Mr. Olde, Sr., several letters asking him to come in. Doubtless Mr. Olde's condition precluded him from appearing in person or answering the letters. A subpœna was served on him to appear August 3, 1917. His son Walter E., who, as we have stated, had been making the collections on this contract, appeared for him. He claimed there was still due on the contract over $2,000 and he presented some memoranda which were not at all convincing to Judge Hulbert. Judge Hulbert figured that the contract had been fully paid and advised Mrs. Gregor to consult a lawyer. The significant part of Judge Hulbert's testimony given in this case is the following:

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"*Q.* Did he tell you at that time that she had paid regularly her payments of $8 every two weeks?
"*A.* Yes, sir, he did. My recollection is that he said up to 1917.
"*Q.* That she had made her regular payments?
"*A.* Yes, sir."

The high standing of Judge Hulbert and his total disinterestedness in the subject-matter of this litigation precludes us from rejecting his testimony and accepting that of interested parties. If the plaintiff and her husband had paid but $8 every two weeks from the date of the contract to the date of this proceeding before Judge Hulbert (and there is testimony from both parties that many payments in excess of $8 were made) they had paid at that time over $3,100. But it is insisted that the Oldes had paid large amounts of State, county and city taxes on the property and had paid for improvements on the premises which sums should be added to the purchase price. From the date of the contract to the time the children and Mr. Gregor figured up the amount that had been paid on the contract the total State and county taxes paid amounted to $26.06 and the total city taxes paid to $122.43. The only improvement put on the house was an annex to the kitchen built about the time the contract was entered into costing $108 and which amount we are satisfied was promptly repaid by Mr. Gregor. Street opening assessments amounting to $35.05 had also been paid. At the time of the proceeding before Judge Hulbert, the total amount of State and county taxes paid from the date of the contract amounted to $48.39, and the total city taxes paid amounted to $239.13, and an additional street opening assessment of $100.44 had been paid. These amounts covered a period of 15 years and do not furnish a justification for the large amounts claimed by defendants. A consideration of the testimony and the figures submitted to us in the numerous tables is convincing to

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us that plaintiff and her husband had paid a considerable sum in excess of the purchase price, the improvements, the taxes and interest, and unless precluded by some inflexible rule of law plaintiff was entitled to a deed.

Defendants insist that there are insuperable legal obstacles to plaintiff's right to a decree for specific performance. The main legal defense is that there has been a former adjudication of the rights of the parties under this contract by a judgment of the circuit court commissioner, and they invoke the doctrine announced in *Security Investment Co.* v. *Meister*, 214 Mich. 337, and similar cases. The burden of establishing this defense is upon the defendants. Upon the hearing of the case it appeared that plaintiff's counsel had by stipulation consented to the adjournment so that the question decided when the case was here before is not of importance. The defendants did not produce the docket of Commissioner May or Commissioner Nichols. What they did and all they did so far as the record discloses was to swear Commissioner May's clerk, who produced the files and they were offered and received in evidence. On the file were some notations showing the various adjournments and then the following:

"May 12. Judgment for restitution of premises, amount found due $2,801.88, $1.50 costs."

This was unsigned and the only testimony identifying the handwriting was from this witness:

"Judge Nichols says that is his handwriting, I put it up to him."

Does this unsigned memorandum with only the hearsay testimony as to the identity of the handwriting establish a judgment and sustain the defense of *res adjudicata?* We think not.

Defendants' counsel rely most strongly on *Hickey*

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v. *Hinsdale*, 8 Mich. 267 (77 Am. Dec. 450). In that case the justice had not entered the judgment on his docket, but his minutes were as full and complete as his docket was required to be, and they were signed by him. Here the minutes are incomplete and unsigned, and there is no competent evidence to establish the handwriting. The case is in principle much like *Wilber* v. *Goodrich*, 34 Mich. 84. In that case what purported to be a transcript of a justice's judgment had been received in evidence. It was not certified to by the justice who was called as a witness but who did not testify to its authenticity. It was held that the judgment was not proven and the case was reversed on this question alone. In *Henry* v. *Gates*, 118 Mich. 379, it was said:

"A paper purporting to be an execution issued upon such a judgment appears in the record, but such execution is insufficient to show a valid judgment. It is no less hearsay than would be testimony of oral statements of the justice to that effect.

"To prove a justice's judgment, it must be shown that jurisdiction of the defendant was obtained, and that at a proper time a trial was had and a judgment rendered, and its amount. This would be required if the dockets were produced, and certainly proof that the lost docket contained as much is requisite."

The testimony in the instant case falls far short of establishing that a valid judgment was rendered, and the defense of *res adjudicata* must fail.

While it is true, as contended by defendants' counsel, that the relief by specific performance rests largely in the discretion of the court, that discretion is a judicial one, and where by the proofs a proper case for such relief is made out, the court is required to grant it and may not arbitrarily refuse it. There is nothing in this record that would justify withholding it in the instant case. Nor can defendants invoke the

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doctrine of equitable estoppel or claim anything for plaintiff's delay in asserting her rights. Defendant Olde and his father continued to receive money from her after she had fully paid all that she owed them and it does not lie with them to now complain of her laches. She many times asked for an accounting which was not given her and defendants are not in position to invoke the doctrine of equitable estoppel.

The decree of the court below will be affirmed. It protected the interest of defendants Prevost. It required defendant Olde to account for the rental value of the premises from the date of plaintiff's eviction to the date of its settlement in the court below. It also allowed plaintiff for certain expenses occasioned by the eviction. Upon the settlement of the decree in this court these items will be brought down to date. Plaintiff will recover costs of this court.

WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

YOUELLS *v.* MORRISH.

1. QUO WARRANTO — LEGALITY OF SCHOOL DISTRICT — DISTRICT A NECESSARY PARTY—TIME—STATUTES.

A proceeding in the nature of *quo warranto*, under 3 Comp. Laws 1915, §§ 13551-13553, to test the validity of the election by which a rural agricultural school district was established and defendants elected trustees, should

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have been brought within 30 days after the election against the school district and not against the trustees as individuals.

2. SAME—AMENDMENT—PARTIES—STATUTORY TIME.

More than 30 days having elapsed after the election, the trial judge properly refused an amendment making the school district a party, since, to have permitted the amendment would have allowed plaintiff to do by indirection what the statute inhibited him from doing directly.

Error to Genesee; Brennan (Fred W.), J. Submitted January 10, 1922. (Docket No. 74.) Decided March 30, 1922.

Quo warranto by Harry Youells against Vern Morrish and others to determine the validity of defendants' election as school trustees. Judgment dismissing the writ. Plaintiff brings error. Affirmed.

Neithercut & Neithercut, for appellant.

George W. Cook, for appellees.

FELLOWS, C. J. Plaintiff by this proceeding in the nature of *quo warranto* seeks to have determined the validity of an election held on July 14, 1921, and purporting to be held under the provisions of Act No. 226, Pub. Acts 1917, as amended, and by which election the rural agricultural district of Swartz Creek, made up of five districts in Genesee county, was established. Defendants are the trustees of said school district. Plaintiff does not claim to be entitled to such office. He does not allege in his petition that he is a taxpayer or resident of the district, although no point seems to be made of this omission. The trial judge sustained the contention of defendants' counsel that the proceedings were not maintainable against the individual defendants, that the petition should be filed against the municipality, and, more than 30 days having elapsed after the election, declined to permit an

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amendment to the petition making the municipality a party. Judgment was thereupon entered dismissing the petition.

The legislature in passing the judicature act (Act No. 314, Pub. Acts 1915) collected with some modifications the provisions having reference to informations in the nature of *quo warranto* in chapter 38 of the act. To the then existing provisions three sections were added; they are sections 28, 29 and 30 of this chapter (3 Comp. Laws 1915, §§ 13551, 13552 and 13553) and are as follows:

"SECTION 28. A petition may be filed in the circuit court of any county of this State whenever it shall be made to appear that material fraud or error has been committed at any election in such county at which there shall have been submitted any constitutional amendment, question, or proposition to the electors of the State or any county, township or municipality thereof.

"SEC. 29. Such petition shall be filed within thirty days after such election by the attorney general or the prosecuting attorney of the proper county on his own relation, or on the relation of any citizen of said county without leave of the court, or by any citizen of the county by special leave of the court or a judge thereof. Such petition shall be filed against the municipality wherein such fraud or error is alleged to have been committed.

"SEC. 30. After the filing of such petition the procedure shall conform as near as may be to that provided by law for informations in the nature of *quo warranto*."

The legislature by adopting these three sections, evidently intended a change in the practice; otherwise nothing was accomplished. A reading of these new sections clearly evidences, we think, this legislative intent: That where it is claimed there was fraud or there was error, invalidity, in an election at which any constitutional amendment, question or proposition has been voted upon, the

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proceedings to test the election must be against the municipality affected by the proceedings and must be brought within 30 days after the election. The purpose of the change is clearly apparent; the municipality to be affected by the proceedings should have an opportunity to be heard, and public policy requires that there should be a speedy determination of the validity of the election before engagements are entered into by such municipality. We repeat what has heretofore been adverted to, that this is not a contest between rival claimants to an office; plaintiff makes no claim that he is entitled to the office held by any of the defendants; his claim being that they are not entitled to hold such offices because the proceedings by which the municipal corporation was established are erroneous and invalid. To assail such proceedings he must do so in the manner pointed out by the statute.

Nor do we think the court erred in refusing plaintiff leave to amend by making the municipality a party. The application for leave to amend was made at the hearing and more than 30 days after the election. To have permitted the amendment would have allowed plaintiff to do by indirection what the statute inhibited him from doing directly.

The judgment will be affirmed.

WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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MOYNES *v.* APPLEBAUM.

1. FRAUD—PRINCIPAL LIABLE FOR AGENT'S FRAUDULENT MISREPRESENTATIONS—NOTICE.

   In an action for fraud and deceit, based upon representations that a house sold to plaintiffs by defendants' agents was constructed of stucco upon tile, when in fact it was stucco upon wood, defendants were liable although the misrepresentations were made by their agents without their knowledge or consent.

2. APPEAL AND ERROR—ERROR IN RECEPTION OF TESTIMONY FAVORABLE TO APPELLANT NOT REVERSIBLE.

   Where testimony by defendants' agent, who was called as a witness by plaintiffs without announcing until later that he was called for cross-examination under the statute, was favorable to defendants, there was no reversible error in its reception.

3. FRAUD—DAMAGES—EVIDENCE—ADMISSIBILITY.

   Evidence showing the difference in the cost of construction between stucco on tile and stucco on wood was properly received for its bearing on the question of damages.

4. SAME—TRIAL—INSTRUCTIONS.

   The trial court correctly instructed the jury that the measure of damages was the difference between the value of the premises as they were and their value had they been as represented.

Error to Wayne; Des Voignes (L. Burget), J., presiding. Submitted January 24, 1922. (Docket No. 128.) Decided March 30, 1922.

Assumpsit by James A. Moynes and another against Isaac Applebaum and another for fraud in the sale of certain real estate. Judgment for plaintiffs. Defendants bring error. Affirmed.

A. W. Sempliner, for appellants.

Lloyd L. Axford and *Max Hulett,* for appellees.

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FELLOWS, C. J. Plaintiffs bring this action to recover damages for fraud claimed to have been perpetrated on them by the agents of defendants in the sale of residential property in the city of Detroit. The claimed fraudulent representations were that the house was stucco on tile, whereas in fact it was stucco on wood, making it less valuable than as represented. There was proof tending to show such representations by defendants' agents. The undisputed testimony shows that Mr. Applebaum and his wife had no knowledge of such representation. They were away from home when the transaction occurred. Harry Applebaum is their son and is the bookkeeper in his father's office. Before leaving, Mr. Applebaum directed his son to sell the premises at $16,000. A real estate broker named Welch learned that the house was in the market and solicited its listing with him; this was done. He interested plaintiffs in the proposition, and the house was shown to them by Harry, and it is claimed by them that he then made the representations complained of. Plaintiffs made an offer of $15,250 for the premises. Defendant Isaac Applebaum was wired to and accepted the offer. An option was given, followed by a contract, and a substantial payment was made on the purchase price. Some time after plaintiffs moved in they learned that the construction was stucco on wood. There is no dispute but that the house is of that construction. It is denied by Welch and Harry Applebaum that any such representations were made. That question, however, is settled by the verdict of the jury. The main question raised by defendants' counsel is the right of plaintiffs to recover from defendants in an action of fraud and deceit for the fraudulent representations of their agents where defendants had no knowledge of such representations and such representations were not authorized by them.

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We are persuaded that this court has settled this question adversely to the contention of defendants' counsel. *Reeves* v. *Kelly*, 30 Mich. 132; *Busch* v. *Wilcox*, 82 Mich. 315; *Smith* v. *Construction Co.*, 175 Mich. 600. The son, Harry, was the agent of his father in making the sale. In selling the property he was acting within the scope of his authority; in making the sale he made certain representations; these were the instrumentalities used by him in his principal's business and for his principal's benefit and they thereby became the instrumentalities of the principal. He can not reap the harvest and refuse to pay for the secd. The cases cited by defendants' counsel, *Mayo* v. *Wahlgreen*, 9 Colo. App. 506 (50 Pac. 40); *Ellison* v. *Stockton*, 185 Iowa, 979 (170 N. W. 435); and *Dellwo* v. *Peterson*, 32 Idaho, 172 (180 Pac. 167), sustain his contention. To these may be added *Kennedy* v. *McKay*, 43 N. J. Law, 288 (39 Am. Rep. 581), and *Samson* v. *Beale*, 27 Wash. 557 (68 Pac. 180). But we think the great weight of authority is the other way. 2 Mechem on Agency (2d Ed.), § 1995, is as follows:

"Whether an innocent principal can be held liable in an action of deceit for the false representations of his agent has been much questioned. It has been held in some cases that such an action cannot be maintained, but the weight of modern authority is to the effect that the action is maintainable. Even though the principal may have had no guilty knowledge, the guilty knowledge of the agent is said to be imputable to him."

In 2 C. J. p. 856, in considering the subject of agency, it is said:

"Where an agent, in negotiating a transaction or making a contract on behalf of his principal, makes representations, declarations, and admissions in connection therewith respecting the subject-matter, they will be binding on the principal, where they are made at the time and as a part of the transaction, and although they are false and fraudulent, made without

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the principal's knowledge and constitute a breach of trust against the principal."

In 1 Am. & Eng. Enc. Law (2d Ed.), beginning at page 1158, will be found the following:

"As in other cases of tort the principal is liable for the fraudulent acts of his agent in the course and within the scope of his employment though in fact the principal did not authorize the practice of such acts.

"Accordingly the fraudulent representations of an agent acting in the course of his employment and in reference to business within the scope of his authority will be binding upon the principal although in perpetrating the fraud the agent acted without the knowledge or consent of the principal."

Ruling Case Law thus tersely states the rule (21 R. C. L. p. 850):

"For frauds and misrepresentations of his agent within the scope of the employment the principal is liable no less than in other cases; and this although he had no knowledge thereof and has received no benefit therefrom."

In *Haskell* v. *Starbird*, 152 Mass. 117 (25 N. E. 14, 23 Am. St. Rep. 809), it was held (we quote from the syllabus):

"False and fraudulent representations made by an agent, general or special, employed to sell land will render the principal liable in an action of tort for deceit although the latter did not authorize them and did not know of them until after the conveyance."

Likewise we quote from the syllabus in *Rush* v. *Leavitt*, 99 Kan. 498 (162 Pac. 310):

"One who sells land through an agent is responsible in damages for the fraud of the agent in making false statements concerning its character by which the sale is effected even although the principal had no knowledge of their having been made."

Mr. Justice Lyon, speaking for the supreme court of Wisconsin in *Law* v. *Grant*, 37 Wis. 548, said:

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"The cases cited by the learned counsel for the defendant abundantly demonstrate the rule of law to be, that if Richard S. Law acted as the agent of the plaintiff in negotiating the sale of the mortgaged premises, the latter is responsible for all the means employed by his agent to effect the sale. If the agent effected it by means of false representations or fraud of any other description, although without authority from the plaintiff to do so, and although the plaintiff was entirely ignorant that he had done so, the legal status of the plaintiff is precisely the same as it would have been had he made the false representations or committed the fraudulent acts to the same end, in person."

See, also, *Crump* v. *Mining Co.*, 7 Grat. (Va.) 352 (56 Am. Dec. 116); *Rhoda* v. *Annis*, 75 Me. 17 (46 Am. Rep. 354); *Larue* v. *Engine Co.*, 176 Ind. 609, 620 (96 N. E. 772); *Millard* v. *Smith*, 119 Mo. App. 701 (95 S. W. 940); *Wheeler* v. *Baars*, 33 Fla. 696 (15 South. 584); *Tompkins* v. *Triplett*, 110 Ky. 824 (62 S. W. 1021, 96 Am. St. Rep. 472); *Hartford Life Ins. Co.* v. *Sherman*, 223 Ill. 329 (78 N. E. 923); *Heidegger* v. *Burg*, 137 Minn. 53 (162 N. W. 889); *Franklin Fire Ins. Co.* v. *Bradford*, 201 Pa. 32 (50 Atl. 286, 55 L. R. A. 408, 88 Am. St. Rep. 770). The trial judge properly overruled defendants' motion for a directed verdict.

Plaintiffs' counsel called as a witness Mr. Welch, the real estate broker who acted for and was paid by defendants, but did not announce when he called him that he was calling him for cross-examination under the statute. Later he made such announcement. Objection is made to some of his testimony, but a reading of it is convincing that defendants were benefited rather than harmed by it. The witness denied that either he, or defendants' son Harry, in his presence made any representation such as plaintiffs claimed and his testimony as an entirety sustained defendants' claim and refuted that of plaintiffs. There was no reversible error in the reception of this testimony.

Evidence was introduced by plaintiffs showing the

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difference in the cost of construction between stucco on tile and stucco on wood. This evidence had some tendency to establish the amount of damages which was correctly stated by the court to be the difference between the value of the premises as they were and the value of them if they had been as represented. There was no error in receiving this testimony and allowing the jury to consider it for this purpose. It was not receivable for the purposes stated when it was offered by plaintiffs' counsel, who seem to have had a clearly erroneous conception of the measure of damages. The court, however, properly instructed the jury as to its use.

Finding no prejudicial error in the record, the judgment will be affirmed.

WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

AROMO v. FIRE ASSOCIATION OF PHILADELPHIA.

1. PARTNERSHIP—CONTRACTS—INSURANCE POLICY WITH INDIVIDUAL PARTNERS VALID—STATUTES—FICTITIOUS NAMES.

A policy of insurance on partnership property taken by the partners in their individual names was not void although they had not complied with either Act No. 101, Pub. Acts 1907 (2 Comp. Laws 1915, § 6349 *et seq.*), or Act No. 164, Pub. Acts 1913 (2 Comp. Laws 1915, § 6354 *et seq.*), requiring filing of certificate of copartnership.

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2. INSURANCE—PARTIES—"REAL PARTY IN INTEREST"—UNDISPUTED TESTIMONY—DIRECTED VERDICT.

Although notice had been given to defendant insurance company that the policy on which action was brought had been assigned to plaintiffs' attorney, where there was no proof of any assignment, and the attorney testified that the notice was a mistake and he had no interest in the policy but that it belonged to plaintiffs, and there was no intimation from defendant's attorney that he desired to go to the jury upon any question in the case, the trial court was not in error in directing a verdict for the undisputed amount of damages in favor of plaintiffs, who, under the proofs, were the "real party in interest" (3 Comp. Laws 1915, § 12353).

Error to Oakland; Lamb (Fred S.), J., presiding. Submitted February 2, 1922. (Docket No. 27.) Decided March 30, 1922.

Assumpsit by Iaston Aromo and others against the Fire Association of Philadelphia on a policy of insurance. Judgment for plaintiffs on a directed verdict. Defendant brings error. Affirmed.

Frederick J. Ward, for appellant.

J. A. & C. C. Tillson, for appellees.

FELLOWS, C. J. Defendant, an insurance company, authorized to do business in this State, on August 31, 1918, entered into the contract of insurance here sued upon with the plaintiffs, Iaston Aromo, Tony Kosocker and John David. The plaintiffs were partners and the property covered by the insurance was partnership property. Plaintiffs had not complied with either Act No. 101, Pub. Acts 1907 (2 Comp. Laws 1915, § 6349 *et seq.*), or Act No. 164, Pub. Acts 1913 (2 Comp. Laws 1915, § 6354 *et seq.*). The contract of insurance was with them in their individual names and the principal defense is that they are precluded from recovery here because of their failure to

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comply with the acts cited. This contention is completely answered by the case of *Rossello* v. *Trella*, 206 Mich. 20. In that case the plaintiffs were partners, but they entered into a contract in their individual names and as individuals. It was held that such a contract was not void by reason of the statute. Here the contract is with the plaintiffs in their individual names and as individuals. It can not be questioned but that each partner had an insurable interest in the partnership property. The contract of insurance under the authority just cited was not void but was valid. The court very properly overruled defendant's motion for a directed verdict.

After the fire two disinterested, competent men made a detailed appraisal, fixing the damages at the sum of $1,187.32. Both were called as witnesses and testified to this amount as the amount of the loss. No testimony contradicting theirs was given. In fact, no testimony was offered by defendant. The insurance company was given notice that the policy had been assigned to Mr. Tillson, one of plaintiffs' attorneys. Upon the trial he testified that this was a mistake, that it was another policy that had been assigned to him, that he had no interest in this policy, and that it belonged to plaintiffs. There was no proof of any assignment of the policy. The policy was introduced in evidence and there was no assignment upon it. The record does not show any intimation from defendant's counsel that he desired the court to submit the two questions just noted to the jury. The testimony introduced by the plaintiffs being all there was in the case, and there being no intimation by defendant's counsel that he desired to go to the jury upon any question in the case, there was no error in the trial judge instructing the jury to render a verdict for the undisputed amount of damages in favor of the plaintiffs who, under the proofs, were the "real

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party in interest." See section 12353, 3 Comp. Laws 1915.

The judgment will be affirmed

WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

SWICK *v.* HARTMAN.

1. DEEDS—UNDUE INFLUENCE—OPPORTUNITY ALONE INSUFFICIENT TO ESTABLISH ITS EXERCISE.

Evidence of opportunity alone is insufficient to establish the exercise of undue influence in the making of a deed by a mother to her daughter and son-in-law in consideration of a home and support for herself and daughter and two granddaughters.

2. SAME—CONTRACTS—VALIDITY.

In a suit by children of the grantor, after her death, to set aside a deed on the ground of undue influence where the record is convincing that, in the making of the contract whereby grantor deeded her farm to a daughter and son-in-law in consideration of a home and support for herself during her lifetime, and for a widowed daughter and children until the daughter remarried, there was no undue influence used, the contract was not unconscionable but was a favorable one for grantor, who was in need of constant attention, and who expressed no dissatisfaction, and that it has been fully performed by the grantees, the decree of the court below in favor of defendants will be affirmed.

Appeal from Montcalm; Davis (Frank D. M.), J.

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Submitted January 5, 1922. (Docket No. 29.) Decided March 30, 1922.

Bill by John H. Swick and others against Howard Hartman and another to set aside a deed. Defendants filed a cross-bill to quiet title. From a decree for defendants, plaintiffs appeal. Affirmed.

Hawley, Eldred & Gemuend, for plaintiffs.

Griswold & Cook, for defendants.

FELLOWS, C. J. The plaintiffs, five in number, and defendant Delilah E. Hartman are the children of Thomas S. D. Swick and Margaret Swick. Mr. Swick died in November, 1917, possessed of a farm of 80 acres situated in Richland township, Montcalm county. After his death all the children joined in a quitclaim deed of the farm to the widow. The following spring Mrs. Swick deeded the farm to plaintiff Lester Swick and his wife, reserving a life use. While not reduced to writing there is no dispute but that the consideration of this deed was an agreement on Lester's part to care for his mother during the balance of her life, pay her funeral expenses, maintain Mrs. Swick's widowed daughter, who lived with her, and also maintain and educate her two young children. After this deed was executed a mortgage was given to a bank for $1,000, the proceeds of which were used to build a house for Mrs. Swick to live in, Lester and his family occupying the old home. Mrs. Swick became dissatisfied with the arrangement with Lester and with the manner in which he was carrying it out and in the late summer filed a bill to have the deed set aside. An adjustment was arrived at and a settlement made with the assistance of some of the neighbors. Lester deeded the farm back to his mother, retaining possession of the premises for a time, had

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nearly all the crops and was given some personal property. Shortly thereafter the deed in controversy was executed by Margaret Swick to the defendants, husband and wife. It was drawn by the register of deeds of Montcalm county in his office, he and Mrs. Swick alone being present. He had known Mrs. Swick a number of years and testifies that she dictated its terms and conditions. It conveyed the farm in question and included the personal property thereon and contained the following provisions:

"It is hereby agreed by and between the parties hereto that the party of the first part retains unto herself a life estate in the above described premises to the extent that the parties of the second part are to give the party of the first part a home and support her with them during her life and at her death give her a proper burial at their own expense, and also the parties of the second part are to give Dora Fay Cromwell and her two children a home and support and send the children to school until they finish the 8th grade, or until the said Dora Fay Cromwell gets married, in which case this agreement is no longer binding. The parties of the second part are also at the death of the party of the first part to erect, or cause to be erected, for her a suitable monument or marker to cost not less than $80."

Mrs. Swick remained with the Hartmans except for a visit to one of her daughters until their house burned on the night of July 8, 1919. The next morning she was moved to the home of plaintiff Isal Johnson and remained there until her death, eight days later. There is in this record no evidence that Mrs. Swick at any time was dissatisfied with the care and attention given her by the Hartmans, nor is there any evidence that they in any way breached their contract with her. She was around 65 years of age; then was and for a number of years had been afflicted with Bright's disease. Mr. Hartman paid her doctor's bills, the interest on the mortgage and the taxes on the farm.

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As the disease progressed and she needed more care he hired a girl to do the housework so that his wife could give her mother the needed attention; after her death he paid the funeral expenses and those of her last sickness, including a bill of $20 rendered by Mrs. Johnson for the eight days her mother was at her house.

The bill seeks to set aside the deed to the Hartmans on the usual grounds of mental incompetency and undue influence. Defendants in their answer claim the benefits of a cross-bill and ask that their title be quieted. The trial court dismissed the bill and granted defendants the relief they prayed. There is no testimony in this record bearing upon the question of mental incompetency that could not be produced in a majority of cases where the grantor had passed middle life. Plaintiffs have signally failed to make a case of mental incompetency. Plaintiffs' counsel seem to appreciate this situation but insist that even though the testimony might not justify a decree on this ground, it shows that the grantor, Mrs. Swick, was in such an enfeebled mental condition that she became an easy prey to the undue influence claimed to have been practiced upon her by the defendants. Counsel insist that we should infer and find that defendants not only exercised undue influence in procuring the deed in question but also by the same means undermined Lester and unduly persuaded Mrs. Swick to break with him and annul their arrangement. Mr. Hartman went with Mrs. Swick to Stanton the day the deed in question was drawn, but the plaintiff Dora Searles also accompanied her although neither was present when the deed was prepared and executed. Mrs. Hartman was not a member of the party. Mrs. Swick was then living with her daughter Dora on the farm. There is little or no evidence even of opportunity and opportunity alone is not sufficient to estab-

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lish undue influence. *Severance* v. *Severance,* 90 Mich. 417; *Blackman* v. *Andrews,* 150 Mich. 322; *In re Williams' Estate,* 185 Mich. 97; *Noble* v. *Hunter,* 195 Mich. 713. In the *Severance Case* this court held (quoting from the syllabus):

"Undue influence cannot be predicated upon opportunity alone, nor upon conduct in the line of filial duty, nor upon a disposition of property not in accordance with the statute of descent."

But plaintiffs' counsel insist that the fiduciary relation existed between Mrs. Swick and defendants and that defendants are, therefore, required to establish that their dealings were in all regards conscionable and free from undue influence. Numerous cases are cited from this and other jurisdictions where this question is considered. It is doubtful if the instant case falls within the line of authorities cited. We need not cite or consider the authorities or decide the question. The record is convincing to us as it was to the trial judge that no undue influence was practiced on Mrs. Swick. The contract was in no way unconscionable. It was to all intents and purposes the same contract she orally made with Lester and none of the plaintiffs questioned the contract she made with him. Mrs. Swick was about 65 years old; she was not in robust health, was afflicted with a disease which would no doubt shorten her life; she was in need of care which would increase as the disease progressed. She not only made her care and support a consideration of the deed but also provided for the care and support of her daughter Dora and her two little children, including their education up to and through the eighth grade. While Dora remarried soon after the deed was executed, neither Mrs. Swick nor the Hartmans had any information that she contemplated such step when the contract was made. Some of the interested testimony fixes a value of $60 an acre for the

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farm; but it was assessed in 1919 at $2,000, having been raised to that figure after the new house was built. But 10 acres had been stumped and much of it was covered by second growth timber. There was a mortgage on it for $1,000. The contract was a favorable one for Mrs. Swick. Defendants have performed it. The decree was right. It will be affirmed, with costs to defendants.

WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

FEDERAL LAUNDRY CO. *v.* ZIMMERMAN.

INJUNCTION — TRADE SECRETS — FORMER EMPLOYEE WILL NOT BE RESTRAINED FROM SOLICITING FOR COMPETITOR WHERE NOT USING TRADE SECRETS OBTAINED FROM EMPLOYER.

Equity will not restrain the driver of a laundry wagon, who had been working on a certain route on salary and commission, and who had severed his relations with his former employer, from working in said territory for a competitor, where he does not use any trade secrets or list of customers furnished by his former employer, but the business produced was largely the result of his own industry, and the provisions of Act No. 171, Pub. Acts 1917, are not involved.

Appeal from Wayne; Shepherd (Frank), J., presiding. Submitted January 25, 1922. (Docket No. 139.) Decided March 30, 1922.

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Bill by the Federal Laundry Company against William H. Zimmerman for an injunction. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Sidney E. Doyle (*William G. Fitzpatrick*, of counsel), for plaintiff.

Edward Pokorny, for defendant.

FELLOWS, C. J. The plaintiff was organized by the consolidation of several laundry companies. Defendant was in its employ from its organization until January 15, 1921. He had worked for the predecessors of plaintiff. He was employed by plaintiff as a driver and had as his territory route 8. He collected the soiled clothes from customers and from agencies of plaintiff located in his territory, brought the packages to the laundry and returned the laundered articles, and collected and turned in the pay for the work. He solicited business and was notified and given the business of all persons in his territory who by telephone, through solicitors sent out by plaintiff, or otherwise requested plaintiff to do their work. He was paid a salary and commission on the business in his territory. Each parcel brought in by him had a slip provided in blank by the company which was filled out and attached to the package, giving the name and address of the customer. From this and other sources a list of the customers in his route was made up by plaintiff. Plaintiff also had a "master route book" made up of all the routes. These lists were kept secret by plaintiff and are a valuable asset.

On January 15, 1921, defendant quit the employ of the plaintiff and accepted employment with one of plaintiff's competitors. Shortly thereafter this bill was filed seeking to restrain defendant from calling for or delivering laundered or unlaundered goods of plaintiff's customers in route 8 or from soliciting

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patronage for his new employer in that territory or from divulging to plaintiff's rival in business information gained by defendant from plaintiff's route lists. The case was promptly tried on its merits and the bill was dismissed.

The testimony does not establish that plaintiff furnished defendant a list of the customers on his route or that defendant obtained or had a copy of the route list made by plaintiff of route 8, or that defendant had any knowledge that a master route book existed. When defendant commenced to work on route 8 the business there was small. At the time the parties severed their relations the route furnished several hundred dollars' worth of business weekly. The testimony fairly discloses that this was due to the character of plaintiff's work, combined with the personality of the driver and his success in soliciting and keeping business. Plaintiff's counsel contends for the broad doctrine that the plaintiff having taken all necessary precautions to keep its lists secret, and the defendant having obtained information as to whom plaintiff's customers were through his employment, such information so received was a trade secret of great value to plaintiff, was, in fact, property of great value which may and should be protected by the injunction of a court of equity. Plaintiff's counsel can not contend, and we do not understand him to contend, that this court has not spoken on the question here involved in the case to which we shall presently refer. He has shown great diligence in bringing to our attention cases from other jurisdictions which sustain his contention, and he insists that the great weight of authority supports his claim and that we should overrule or at least modify our former holding. On the other hand defendant's counsel calls our attention to holdings from other States in accordance with our holding; other cases are to be found along the

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same line. We shall not discuss the authorities from other jurisdictions as we are satisfied that the question is foreclosed in this jurisdiction and unless we disregard the doctrine of *stare decisis* the decree must be affirmed.

In the case of *Grand Union Tea Co.* v. *Dodds*, 164 Mich. 50 (31 L. R. A. [N. S.] 260), the method of doing business was quite similar to that employed in the instant case. This court there recognized the property right of the employer in his lists of customers which had been given to and used by the employee, and inhibited by injunction the use thereof or the use of a copy surreptitiously obtained by the employee for the benefit of a competitor and required the employee to furnish the employer with lists he had withheld. But upon the question here involved we declined to restrain the defendant from earning a living by soliciting business from his former employer's customers. Mr. Justice HOOKER, who wrote for the court, said:

"We are of the opinion, however, that he cannot be restrained from selling his commodities, for himself or for any employer, in any part of the city, or to any person, so long as he does not use any property belonging to the complainant, or copies thereof that were surreptitiously made."

The relief here sought is the relief denied in the *Dodds Case*. The cases can not be distinguished. Unless we overrule that case plaintiff is not entitled to the decree here asked. We are not disposed to overrule it. We think it sound in principle, and that it protects the property rights of the employer without destroying the right of the employee to pursue a lawful occupation.

We are not here dealing with a contract made pursuant to the provisions of Act No. 171, Pub. Acts 1917,

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as the defendant in the instant case declined to enter into such a contract.

The decree of the court below will be affirmed, with costs to defendant.

WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

DAY *v.* GRAND RAPIDS RAILWAY CO.

1. JUDGMENT—DENIAL OF MOTION FOR DIRECTED VERDICT—RESERVING DECISION—NON OBSTANTE VEREDICTO.

   The denial of defendant's motion for a directed verdict without any statement from the judge that decision thereon was reserved under the statute (3 Comp. Laws 1915, § 14568), would not preclude the judge from granting a motion to enter judgment *non obstante veredicto*, where, although the verdict was recorded, judgment thereon was stayed to permit the making of said motion; such proceeding clearly indicating that the judge reserved final decision of the question.

2. SAME—JUDGMENT NON OBSTANTE VEREDICTO ERRONEOUS WHERE QUESTION OF FACT PRESENTED.

   In an action against a street railway company for personal injuries, where defendant pleaded a release, plaintiff's testimony on direct-examination that the release was obtained by fraud, although somewhat contradicted by her on cross-examination, made a case for the jury, since it was their province, and not that of the court, to say which of plaintiff's versions was to be believed, and the entry of judgment *non obstante veredicto* was error.

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Error to superior court of Grand Rapids; Dunham (Major L.), J. Submitted February 7, 1922. (Docket No. 95.) Decided March 30, 1922.

Case by Jessie Day against the Grand Rapids Railway Company for personal injuries. Judgment for defendant *non obstante veredicto*. Plaintiff brings error. Reversed, and judgment entered on the verdict.

Smedley, Linsey & Shivel, for appellant.

Knappen, Uhl & Bryant, for appellee.

CLARK, J. Action for personal injuries. Defendant with its plea gave notice of settlement of the claim, that defendant had paid plaintiff $115, and had paid her doctor's bill, which had been accepted by plaintiff in full satisfaction and discharge of liability and that she had signed a release accordingly. Plaintiff claimed a continuing injury and disability following the accident. After plaintiff had consulted a physician a number of times and after he had declined to express an opinion of when she would be able to return to work, she was approached by a claim agent of defendant with whom the settlement was negotiated. Plaintiff testified:

"*Q.* He didn't wait for you to come down to their office?

"*A.* No, that was why I was so surprised that last time he came, he came the afternoon of the day that I had been looking for Dr. Beel, and Dr. Beel hadn't been there.

"*Q.* He hadn't been there yet?

"*A.* No.

"*Q.* That was the day—

"*A.* That I made the settlement with them.

"*Q.* Claimed that the settlement was made?

"*A.* Yes.

"*Q.* What time of the day did Mr. Kerwin get there?

"*A.* Along in the afternoon, 3 or 4 o'clock, somewhere about that time.

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"Q. Tell the jury about what he first said, if you will?

"A. Why, he just asked after my condition. I told him I hadn't been able to get out at all, and I said Dr. Beel is coming today to make reservation for me over to the hospital.

"Q. In that connection, anything said about your condition by yourself, how you were getting along?

"A. I said I wasn't getting along, and hadn't been able to do anything, and hadn't even been able to do little light sewing in my own room.

"Q. And then what else was said? What did you say about Dr. Beel coming?

"A. I said Dr. Beel was coming and he was going to make reservation for me over to the hospital, and I said, I don't want to settle with you until after I have talked with Dr. Beel.

"Q. Did you tell him why you wanted to talk to the doctor?

"A. Yes, I wanted to find out how long before I could go to work, because I couldn't—I hadn't no other way of living only to go to work.

"Q. Did you tell him that?

"A. Yes, I told him that, and he says, 'I have seen Dr. Beel, and he says that you will be able to go to work in a few days.'

"Q. Then what else did he say?

"A. And he said there wasn't any use in dragging it out as he could see any longer, that Dr. Beel assured him that I would be able to go to work.

"Q. When?

"A. In a few days. He said, now, if we put this two weeks ahead, by that time you surely will be able to go to work, and I said, if Dr. Beel has told you that, Dr. Beel hadn't come as he agreed to, that was the trouble, you know; he was to have come that day, but he hadn't come, and in his place Mr. Kerwin came and stated that he had seen Dr. Beel, and as long as Dr. Beel hadn't come and he did and said that, why, what was I to think, except it was the truth; I believed it.

"Q. All right. Then what did you say after he told you that he had talked to Dr. Beel and you would be all right in a few days?

"A. I said if Dr. Beel was sure of that, I had just

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as soon straighten with him right then as any other time, only I must know that I was able to go to work in a few days.

"*Q.* Then what did he say?

"*A.* And he said he had—he repeated it—that he had seen Dr. Beel, and so on, the same thing over again.

"*Q.* Then what took place?

"*A.* And I signed his paper."

In discussing, on a motion for judgment notwithstanding the verdict, whether there was a question for the jury that the settlement and release had been obtained by fraud and misrepresentation, the trial judge said, in speaking of the testimony quoted, and of other similar testimony:

"If this was the only testimony in the case, it would be a question for the jury, but it is claimed by defendant that in view of her cross-examination, that she did not believe Dr. Beel made such statement," etc.

And the judge then reviewed the testimony of plaintiff in which she made statements in conflict with her testimony quoted. Defendant made a motion for a directed verdict. It was denied without any statement that decision thereon was reserved. See section 14568, 3 Comp. Laws 1915. The case went to the jury, who returned a verdict for plaintiff. The verdict was recorded, but judgment was not entered. There was a stay for the purpose of moving for a judgment notwithstanding the verdict. The motion was made and heard, and judgment for the defendant was entered. Plaintiff brings error.

1. The denial of the motion for a directed verdict without a statement or indication that the question was reserved under the statute is not conclusive. Such denial must be treated here as merely for orderly proceeding. The entry of the verdict without judgment thereon, with a stay to permit a motion for judgment notwithstanding the verdict, indicates sufficiently that

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the judge reserved final decision of the question. The cases of *Wulff* v. *Bossler*, 199 Mich. 70, and *Yerkes* v. *Antrim Circuit Judge*, 200 Mich. 443, are not in point, for in both of them judgment had been entered upon the verdict before the motions under said statute were made.

2. The court erred in ordering judgment for defendant. It was not for the court to say which of plaintiff's versions of the settlement was to be believed. On such motion the evidence must be viewed in the light most favorable to plaintiff, and when so viewed, her evidence on direct-examination, and much of what she said on cross-examination, supports her claim of fraud and misrepresentation. Her testimony, though conflicting, made an issue for the jury. *Parnell* v. *Pungs*, 190 Mich. 638, and cases there cited; *Bertha* v. *Regal Motor Car Co.*, 180 Mich. 51; *Marple* v. *Railroad Co.*, 115 Minn. 262 (132 N. W. 333).

The case of *Radford* v. *Gaukler*, 196 Mich. 94, is distinguishable, for the majority opinion states, * * *

"that, if it can be said the issue was for the jury, the verdict, nevertheless, should have been set aside upon motion. as opposed to the weight of the evidence. A new trial should be granted."

Here there was no motion for a new trial, and the question of the verdict's being against the great weight of the evidence is not before us.

Judgment reversed. The cause is remanded with directions to enter judgment upon the verdict as rendered.

FELLOWS, C. J., and WIEST, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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In re DAVIS.

GUNST *v.* DAVIS.

EXECUTION — BODY EXECUTION — RETURN DAY MAY BE AMENDED — STATUTES.

The court has power to grant amendment of a body execution made returnable in less than 20 days to conform to the statute (3 Comp. Laws 1915, § 12816), which requires executions to be returnable "not less than 20 nor more than 90 days from the date thereof;" failure to conform therewith rendering the execution voidable only.

Certiorari to Macomb; Tappan (Harvey), J., presiding. Submitted January 11, 1922. (Docket No. 85.) Decided March 30, 1922.

Habeas corpus proceedings by William Davis to obtain his release from a body execution. From an order denying a motion to amend the body execution, and discharging defendant, plaintiff brings certiorari. Reversed.

Stone, Nunneley & Hummrich, for appellant.

Lungerhausen, Weeks & Lungerhausen, for appellee.

FELLOWS, C. J. George Gunst recovered judgment in the sum of $1,500 against William Davis in the Macomb county circuit for assault and battery. Execution was issued and returned unsatisfied June 1, 1921. On June 14th a body execution was issued returnable June 30th. Defendant was taken into custody and July 25th instituted *habeas corpus* proceedings to secure his release, his claim being that the execution was void because the return day was less than 20 days, contrary to the provisions of the statute

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(3 Comp. Laws 1915, § 12816). Plaintiff's counsel then moved to amend the return day, setting up that the error in the return day was due to mistake and was intended to be July 30th. The matters were heard together and the trial judge reached the conclusion that the provisions of the statute as to the return day were mandatory, that he had no power to grant the amendment, and that the process was therefore defective in matter of substance required by law. He entered an order denying the motion to amend and discharged the defendant. This order is now before us on writ of certiorari.

We intimated in *Jensen* v. *Oceana Circuit Judge,* 194 Mich. 405, that it was the better practice to move to quash in the court which issued the writ where it was sought to attack the levy. But in the instant case one order was made involving both matters and the parties have fully discussed all questions without raising any objection to the propriety of the remedy; we shall proceed to dispose of the questions on the merits.

The crucial questions are whether the requirement of the statute that "executions shall be made returnable not less than twenty nor more than ninety days from the date thereof" is mandatory, and executions not conforming to this provision are a nullity, or whether the court has the power to amend an execution so that it will conform to this provision of the statute, it not having so conformed when issued—whether the execution is void or voidable only. Counsel agree that the precise question has not been presented to this court. *First National Bank* v. *Dwight,* 83 Mich. 189, is relied upon most strongly by defendant's counsel as applicable by analogy. In that case a creditor's bill had been filed. The execution which had preceded it was returnable less than 20 days from its issue, and it was held that the bill could not be

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maintained. Complainant had not there exhausted his remedy at law and it was held that the defendant could not be harassed by the proceedings unless the execution had been in the hands of the sheriff the statutory period. It was not held that the execution was a nullity or that it could not be amended, but it was held that complainant had not perfected its right to maintain a creditor's bill.

In *Jenness* v. *Lapeer Circuit Judge*, 42 Mich. 469, an execution had been issued after the death of the plaintiff without reviving the suit. This court fully considered the question of whether the execution and sale were void or voidable only and pointed out that voidable proceedings may be saved by amendment while void ones may not be, and it was held that the defect was but an irregularity which might be cured by an order *nunc pro tunc*. In *Arnold* v. *Nye*, 23 Mich. 286, it was held that the failure to attach the seal to the execution did not render it void and that the irregularity could be cured by amendment. In *Dewey* v. *Dewey*, 151 Mich. 586, the execution had been issued before the decree was enrolled, but it was held that the defect might be cured by a *nunc pro tunc* order, and this although the statute (1 Comp. Laws 1897, § 468) provided that "no execution shall be issued on any final decree until the same shall have been enrolled as hereinbefore provided." In *Shepard* v. *Schrutt*, 163 Mich. 485, the sheriff during the hearing of a chancery case on a bill filed in aid of execution was permitted to attach to the execution a statement of his proceedings thereunder; and in *Forsythe* v. *Washtenaw Circuit Judge*, 180 Mich. 633 (L. R. A. 1915A, 706), the sheriff was permitted to indorse the date he received the execution although the statute unequivocally made it his duty to make the indorsement "on receipt" of the execution (3 Comp. Laws 1915, § 12820).

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These cases are not directly in point but they may be helpful by analogy as indicating that certain statutory requirements having to do with executions are directory only. We are not persuaded that the cases dealing with the provisions for short summons in justice's court are controlling. Justices' courts are courts of limited jurisdiction while we are here dealing with the action of a court of general jurisdiction. While we have been unable to find that this court has directly passed on the question here involved, other courts have had it before them and the text-writers have given the question their attention. In Ruling Case Law it is stated (10 R. C. L. p. 1241):

"At the present day, the power to amend executions so as to correct clerical misprisions is universally conceded, and frequently invoked. Indeed, it is very difficult to prescribe limits to this salutary power possessed by the courts, of permitting amendments in their process, whether mesne or final. Conformably to this liberal attitude of the courts towards amendments generally, instances may be cited of amendments of executions with reference to errors in matters of form, in directions to the officer, in describing the date of the judgment, or of its docketing, in designating the return day, in the clause of attestation, or generally, in matters relating to the court, place or time of return." * * *

Mr. Freeman finds no difficulty in determining that the great weight of authority supports the power to amend. He says (1 Freeman on Executions [3d Ed.], § 44):

"The period within which the execution is to be returned differs in the different States, being regulated by local statutes. At common law, the time for the return was designated in the writ, and this practice still obtains in most, but not in all, of the States. It has sometimes been held that an error in the return day, or, in other words, the designation in the writ of a return day at a time different from that designated by law, was fatal. But this view is entirely without

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the support of reason, and is now opposed by a decisive majority of the reported adjudications upon this subject. In fact, there is no mere matter of form from which a departure could be of less detriment to the parties. The provision for a return day is beneficial mainly, if not solely, to the plaintiff, because it fixes a time when he may expect to obtain the fruits of his judgment, by compelling the sheriff to have the writ satisfied, if satisfaction can be had. The defendant has no interest in the return day, for the writ, as soon as sued out, may and ought to be levied, whether it be returnable in ten days or in six months."

In *Goode's Adm'r* v. *Miller*, 78 Ky. 235, it was said by the court:

"By the rule of the common law, executions were either issued or made returnable in the term time, but by our statutes they were formerly returnable in not less than thirty nor more than ninety days, and now seventy days is the limit between the teste and return of the writ. The rule of the common law was regarded as directory only, and such has been the ruling under the various statutes on the subject."

The following authorities will be found to sustain the excerpts above quoted: *Mitchell* v. *Corbin*, 91 Ala. 599 (8 South. 810); *People, ex rel. Davis*, v. *Montgomery Common Pleas*, 18 Wend. (N. Y.) 633; *Milburn* v. *State*, 11 Mo. 188 (47 Am. Dec. 148); *Cherry* v. *Woolard*, 23 N. C. 438; *Williams* v. *Hogeboom*, 22 Wend. (N. Y.) 648; *Denn* v. *Lecony*, 1 N. J. Law, 111; *Van Deusen* v. *Brower*, 6 Cow. (N. Y.) 50; *Jackson* v. *Bowling*, 10 Ark. 578; *Stephens* v. *Dennison*, 1 Ore. 19; *Perkins & Co.* v. *Woodfolk*, 67 Tenn. 480; *Shoemaker* v. *Knorr*, 1 Dall. (Pa.) 197; *Saunders* v. *Smith*, 3 Ga. 121; *Reubel* v. *Preston*, 5 East. 291; *Atkinson* v. *Newton*, 2 Bos. & P. 336; Herman on Executions, §§ 66, 67; 1 Abbott, Cyc. Mich. Practice, pp. 707, 708. The only cases militating against those just cited which we have been able to discover in the time at our disposal are *Furtade* v. *Miller*, Barnes, 213; the

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holdings of the Vermont court of which *Fifield* v. *Richardson*, 34 Vt. 410, is typical, and *Harris* v. *West*, 25 Miss. 156. This Mississippi case, however, must be regarded as modified at least by the holding of that court in *Brown* v. *Thomas*, 26 Miss. 335.

We are persuaded that the statement of Mr. Freeman above quoted is supported by reason and authority and that it was within the power of the trial court to grant the motion to amend the return day of the writ. From this it follows that the order made must be vacated and the case remanded to the circuit court for Macomb county for such further proceedings as may be had not inconsistent with this opinion. Plaintiff in certiorari will recover costs of this court.

WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

ANDERSON *v.* LEVIN.

QUO WARRANTO—ESTABLISHMENT OF TOWNSHIP SCHOOL DISTRICT—PROCEEDINGS TO TEST VALIDITY—TIME.

Petition in the nature of *quo warranto* under 3 Comp. Laws 1915, §§ 13551-13553, to test the validity of the establishment of a township school district pursuant to 2 Comp. Laws 1915, § 5909 *et seq.*, must be filed within 30 days after the election.

Error to Muskegon; Vanderwerp (John), J. Sub-

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mitted January 19, 1922. (Docket No. 104.) Decided March 30, 1922.

Quo warranto by Mary E. Anderson and others against Fred Levin and others to determine the validity of defendants' election as school trustees. Judgment dismissing the writ. Plaintiffs bring error. Affirmed.

Stephen H. Clink and *James E. Sullivan*, for appellants.

William E. Osmun and *Cross, Foote & Sessions*, for appellees.

FELLOWS, C. J. At the spring election held April 5, 1920, in the township of Montague, Muskegon county, it was voted to organize the township into a single school district pursuant to Act No. 117, Pub. Acts 1909, as amended (2 Comp. Laws 1915, § 5909 *et seq.*). On July 12th following defendants were elected trustees of such district. On February 25, 1921, plaintiff, a resident and taxpayer of the township, filed this information in the nature of *quo warranto*, leave so to do having been granted by the circuit judge. In her petition she alleges that the school district has not been legally formed. She does not claim the office of trustee and by her petition bases her right to relief solely on the invalidity of the organization of the district. By their pleadings defendants insisted that the proceedings could not be maintained because the petition was not filed within 30 days after the election of April 5th. The trial judge disposed of the case on its merits, dismissing the petition, and plaintiff brings the case here for review. We shall not review the merits of the case as the defendants are clearly right in their contention that the proceedings must be instituted within 30 days after the elec-

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tion. In *Youells* v. *Morrish, ante,* 194, we considered the effect to be given sections 13551, 13552 and 13553, 3 Comp. Laws 1915, and held that the practice therein provided should be followed in a case identical with the instant case.

The judgment is affirmed.

WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

SABIN v. SOUTHARD.

1. NEGLIGENCE—FIRES—EVIDENCE—ADMISSIBILITY.
   In an action for damages to plaintiffs' property caused by defendants' threshing machine engine, the admission of testimony tending to show that the engine had set other fires, *held,* not error.

2. TRIAL—INSTRUCTIONS—REFUSAL OF REQUESTS.
   Where such of defendants' requests to charge as should have been given were covered by the general charge, there was no error in refusing said requests.

3. APPEAL AND ERROR—JURY TRIER OF FACTS—NEW TRIAL—WEIGHT OF EVIDENCE.
   Since the questions of fact are for the jury, the Supreme Court will not reverse a case on the facts unless it appears that the trial judge was clearly wrong in refusing a new trial because the verdict was against the great weight of the evidence.

Error to Allegan; Cross (Orien S.), J. Submitted

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October 6, 1921. (Docket No. 52.) Decided March 31, 1922.

Case by George Sabin and another against John E. Southard and others for the negligent burning of plaintiffs' barn. Judgment for plaintiffs. Defendants bring error. Affirmed.

Clare E. Hoffman and *Myron D. Moore* (*W. J. Barnard*, of counsel), for appellants.

Charles Thew, for appellees.

MOORE, J. This action is brought by plaintiffs against defendants to recover damages because of a fire which, on September 25, 1919, destroyed a barn and other buildings and personal property belonging to the plaintiffs. Plaintiffs claim they entered into a bargain with John Southard, Sr., to thresh their grain, he to furnish plaintiffs the outfit with a crew; that in the forenoon of September 25, 1919, after they finished threshing, sparks from the engine set fire to the straw in the south mow which burned up the property mentioned. It is the further claim that the man who was employed by them to run the engine was negligent in that the engine at the time was burning wood for fuel, and that it was not equipped with a hood spark arrester constructed in compliance with the statute, having an oval top of number 10 mesh 22 gauge wire and sides composed of number 6 mesh 16 gauge wire. It is claimed that while the wind was blowing from the engine toward the barn, the engineer backed up 3 times to within 30 feet of the large barn door and hitched to the separator, which was in the barn; that smoke in large volumes blew directly into the barn door and upon the south mow of straw, and that he knew the engine threw sparks when burning wood sufficient to set fire within

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that distance, and that it had done so a short time before; that he then took the separator and went away without warning plaintiff or making any arrangements to watch for fires, and that the barn was soon afterwards discovered to be on fire. The plaintiffs further claim defendant Harry Eldred, the engineer, exercised gross negligence in what he did and that he did not have any spark arrester in place on the smokestack. That plaintiffs relied upon the defendants using due care and having an engine and handling it in a way not dangerous for the setting of fires.

The defendants claim that the defendant John Southard, Sr., had nothing to do with the making of the bargain for the threshing; that he had sold the outfit to the other two defendants, and that these two defendants were operating the threshing machine outfit and that they threshed for the plaintiffs. They claim that they informed plaintiffs that they should furnish coal for fuel; that the coal furnished was not enough and that the plaintiffs were so informed and told them to use wood. They claim that the wood furnished was poor wood and liable to throw sparks. They claim this engine was well equipped to burn good fuel and was carefully operated by the defendants. They claim they had a suitable screen in the smokestack and that in taking the engine and separator from the farm of the plaintiffs the engine was operated in a prudent and careful manner. The defendants claim they were not guilty of any negligence whatever in threshing for the plaintiffs. They claim that the plaintiffs were guilty of contributory negligence in not furnishing good fuel and in not taking the proper precautions to prevent fires. The defendants claim they are not liable to the plaintiffs in any sum whatever. The jury returned a verdict in favor of the plaintiffs in the sum of $2,041.80. A motion

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for a new trial was made and overruled. The case is here by writ of error.

Counsel discuss the claimed errors under the following heads:

(1) Errors in the admission and rejection of testimony.

(2) Errors in the refusal of defendants' requests to charge.

(3) Errors committed in the charge of the court given *sua sponte*.

(4) Errors in refusing to grant a new trial.

1. Counsel contend that the introduction of testimony tending to show that the engine had set other fires was incompetent, irrelevant and immaterial and was prejudicial to the rights of the defendants. The cases cited by counsel have been examined in connection with the record, and do not show the court erred in the reception of such testimony as he received upon that phase of the case.

Heads 2 and 3 may be considered together. Counsel call attention to the five written requests which they offered and which were not given except as covered by the general charge. The charge to the jury covers 13 pages of the printed record and covers such of the defendants' requests to charge as should have been given.

4. Did the court err in refusing a new trial? We are in grave doubt as to whether the judge ought not to have granted a new trial to John Southard, Sr., for the reason that the verdict as to him is against the great weight of the evidence. We quote some of his testimony:

"*Q.* What have you had to do with the threshing business the last two or three years?

"*A.* Nothing.

"*Q.* At all?

"*A.* No, sir.

"*Q.* Did you make any bargain with Mr. Sabin to do any threshing?

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"A. Mr. Sabin drove in there, of course, and he got to talking and he asked us if we were going to run and I told him I supposed the boys were and he had a job and I told him probably they would do it.

"Q. What was the principal talk that day?

"A. It was about horses.

"Q. Did you have anything to do with the threshing business this year or last year, 1919?

"A. I didn't have anything to do with it the last three or four years. I turned it right over to the boys; I am too old to thresh and I always told everybody so and I ain't a going to do it any more.

"Q. Did you go over to this job with them or go over to this man at all last year?

"A. No, sir."

Cross-examination by Mr. Thew:

"Q. John, who owns that machine?

"A. Well, you might call it Harry Eldred and John Southard, Junior.

"Q. Don't you have any interest in it at all?

"A. I let them have it and turned it over to them and they pay me along when they are a mind to.

"Q. How much is there back on it they owe you?

"A. What they owe me? I don't know how much they paid me particularly.

"Q. What did you sell it to them for when you turned it over to them?

"A. I ought to get a thousand dollars out of it.

"Q. What did you sell it to them for when you turned it over to them?

"A. I told them to go ahead and make what they could.

"Q. You sold the machine to them at what price?

"A. Well, I told them that I ought to get a thousand dollars out of it.

"Q. And how much have they paid you now up to date?

"A. Oh, probably five or six hundred.

"Q. Well, do you know they have paid you that much?

"A. Why, I should judge they have.

"Q. Have you kept any track?

"A. I couldn't tell you exactly.

"Q. Have you kept any track of it?

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"*A.* Well, not much.

"*Q.* Have you put it down in a book when they would pay you from time to time on that engine?

"*A.* No, I never booked it.

"*Q.* Never booked it at all?

"*A.* No.

"*Q.* Just kept it in your head?

"*A.* Yes, sir.

"*Q.* Who owned the threshing machine?

"*A.* That is the threshing machine we are talking about.

"*Q.* I thought we were talking about the engine.

"*A.* Oh, the engine. I thought it was the whole rig, that is what I calculated; the engine and the separator goes together, also the tank, pump and hose.

"*Q.* All for a thousand dollars?

"*A.* Yes, sir.

"*Q.* Now when was that you sold that to them?

"*A.* Four years ago.

"*Q.* Can you tell me about what time of the year?

"*A.* Well, I think it was about along in June.

"*Q.* You think that was in June four years ago?

"*A.* Yes, sir.

"*Q.* Last June?

"*A.* Three years ago is when I got the new one for them. We had an old one we had run a good while and the boys thought they ought to have a little better rig and so John and I, we went over to Hartford and struck a fellow and bought a new separator.

"*Q.* And you turned it over?

"*A.* Sure, and let them go right on.

"*Q.* You turned it over to the boys?

"*A.* Yes, sir.

"*Q.* That was two years ago?

"*A.* That was three years ago.

"*Q.* Who did you buy that of, the Rumely Company direct?

"*A.* Yes, the Rumely Company.

"*Q.* You bought it of them direct?

"*A.* Direct, no, I—

"*Q.* Or through some agency?

"*A.* Well, sir, an agent came to our house and gave us quite a talk and we went over and saw another one and that didn't hit us and before we got through we made a bargain for this new one.

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"*Q.* And you made that with the agent of the Rumely Company?
"*A.* I suppose so.
"*Q.* What was his name?
"*A.* I don't know; I suppose John could tell.
"*Q.* Did you pay all cash for it?
"*A.* John is in the business—
"*Q.* Did you pay all cash for it?
"*A.* Yes, sir.
"*Q.* Paid all cash down?
"*A.* Yes, sir.
"*Q.* Who paid the cash?
"*A.* Well we had it fixed up between us.
"*Q.* Who furnished the money; you?
"*A.* I went to the bank and signed the checks over.
"*Q.* That is, you had the money in the bank and gave our check for it?
"*A.* Some of us did.
"*Q.* Did you have your money in the bank and give your check for it?
"*A.* No, I give a check on the bank.
"*Q.* Your check on the bank?
"*A.* Well, you could call it mine or the bank check; I suppose it would be on the bank.
"*Q.* Then it was your money that paid for the machine?
"*A.* Well, it was ours together.
"*Q.* How do you—
"*A.* The boys always helped make the money.
"*Q.* So you kept your money altogether?
"*A.* We kept it going in just that way.
"*Q.* So you had this money in the bank in your name?
"*A.* Yes, sir.
"*Q.* But all of you owned it together?
"*A.* Yes, sir.
"*Q.* So you drew your check on that money to pay for this machine?
"*A.* Yes, sir."

The two young men testified as to the ownership substantially the same as the father.

Mr. Sabin testified as to the arrangement about doing the threshing as follows:

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"*Q.* What arrangement did you make for having your grain threshed and who did you talk with and who was present and where?

"*A.* John Southard, Sr., at his place. I went over and talked with him, if he could come over in the neighborhood and thresh and he said he had a job or two to do down here, down toward Chicora, and he said he would be over in our neighborhood in about two weeks. I said, 'All right, I would like to thresh as quick as I can because I have got a lot of grain stacked and wouldn't like to have it get soaked.' He said, 'I think we can get in there in the two weeks and thresh you out.' I said, 'All right' and went home. I told him where my grain was, that I had a job of rye on Mr. Montague's place, which is on this side of the river. At that time there was nothing said about coal or anything pertaining to the terms of the threshing. We talked about terms.

"*Q.* Tell all that occurred there at that time?

"*A.* I think he said he charged 9 cents for oats and 10 cents for rye. That is about all the conversation we had there at that time.

"*Q.* Was there anything said as to the men he would furnish?

"*A.* He was to furnish the crew."

Mr. Southard gives a different version of this arrangement and says he told Mr. Sabin that he had no doubt the young men would do the threshing and that he did not agree that he would do it. The license to do the threshing issued by the secretary of state was issued to John Southard, Jr. The older Southard did not accompany the machine and took no part in the threshing which was done at the plaintiffs'. However, the questions of fact are not for us to determine unless the trial judge was clearly wrong in refusing a new trial. He saw and heard the witnesses. He listened to the direct-examination and the cross-examination. It is evident he was of the opinion that what was said on the direct-examination could not well be harmonized with what was said on the cross-examination and by the actual conduct of the business.

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We think we ought not, under the well-settled rules of this court, to reverse the case because a new trial was not granted. *Gardiner* v. *Courtright*, 165 Mich. 54; *Fike* v. *Railroad Co.*, 174 Mich. 167; *Druck* v. *Antrim Lime Co.*, 177 Mich. 364· *Walsh* v. *Railway Co.*, 185 Mich. 177.

The judgment is affirmed, with costs to the appellees.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

PEOPLE v. HARRIGAN.

1. HOMICIDE — CRIMINAL LAW — INFORMATION—EVIDENCE—CONVICTION UNDER ONE COUNT ACQUITS UNDER OTHERS.

   In a prosecution for involuntary manslaughter under 1 Comp. Laws 1915, § 4817, where the information charged defendant with the killing of a man, under the first count, while driving an automobile at the reckless and dangerous rate of speed of 35 miles an hour, under the second count, while driving an automobile while intoxicated, and under the third count while approaching and traversing a certain bridge and deep descent without having his automobile under control, and the issues under all three counts were submitted to the jury, the result of the finding of defendant guilty under the third count was to acquit him of the charges in the first and second.

2. SAME—INFORMATION—EVIDENCE—VARIANCE.

   Where there was no evidence of either a bridge or a steep descent at the place of the killing, there was a fatal variance between the information and the proofs.

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3. SAME—EFFECT OF ACQUITTAL UNDER CERTAIN COUNTS.
The acquittal under the first and second counts sheared the third count of every essential element of the crimes charged in the first and second counts, and prevented a verdict of guilty for criminal recklessness in driving unless while approaching or traversing a steep descent.

4. SAME—EVIDENCE—SUFFICIENCY.
Testimony *held*, to completely negative the charge that defendant, at the place of the killing, was approaching or traversing a steep descent, and therefore his conviction was error.

5. SAME—EVIDENCE—JURY'S VIEW OF LOCUS IN QUO NOT TO SUPPLY EVIDENCE.
A view of the *locus in quo* by the jury is to permit them to better understand the evidence offered and not to supply evidence; and, therefore, a conviction contrary to the evidence offered by the prosecution is not authorized thereby.

6. SAME—NEW TRIAL—EVIDENCE—SUFFICIENCY.
Where defendant's conviction was contrary to the evidence, his motion for a new trial should have been granted.

7. SAME—PREJUDICIAL ERROR—MISCARRIAGE OF JUSTICE.
Defendant's conviction contrary to the evidence was so prejudicial to his rights that the conviction cannot be saved under 3 Comp. Laws 1915, § 14565, providing that no case shall be reversed for error unless resulting in a miscarriage of justice.

Error to recorder's court of Detroit; Heston (William M.), J. Submitted January 17, 1922. (Docket No. 169.) Decided March 31, 1922.

John Harrigan was convicted of involuntary manslaughter, and sentenced to imprisonment for not less than 5 nor more than 15 years in the State prison at Jackson. Reversed.

Chawke & Sloan, for appellant.

Paul W. Voorhies, Prosecuting Attorney, and *Edwin S. Bartlett* and *Robert M. Toms*, Assistants Prosecuting Attorney, for the people.

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WIEST, J. Defendant was convicted of the crime of involuntary manslaughter, and brings the case here by writ of error. It is claimed by the prosecution that, on the 25th day of February, 1921, several workmen were repairing a street railway track on Fourteenth avenue in the city of Detroit, working near the center of the street, a little over 100 feet north of a viaduct, when the defendant, driving his automobile north on the street, in broad daylight, at a speed of upwards of 30 miles an hour, ran into the workmen and knocked them down like "nine pins," killed one and, without lessening his pace, drove on. The information filed against defendant contained three counts; the first charged him with criminal recklessness in driving his automobile at the dangerous rate of 35 miles per hour upon Fourteenth avenue in the city of Detroit, etc., and as a consequence he killed one Kosta Kiroff; the second charged him with driving his automobile while intoxicated, and the third with approaching and traversing a certain bridge and steep descent without having his automobile under control, and without regard to the traffic and safety of persons on the street. We have stated only the substance of the charges. The issues were submitted to the jury on all three counts, and defendant was found guilty under the third count. The result, therefore, of the verdict was to acquit defendant of the charges in the first and second counts.

A motion for a new trial was made in which defendant alleged the verdict was against the weight of the evidence,

"because there was and is no bridge or steep descent on Fourteenth avenue near Kirby avenue, where the injuries to Kosta Kiroff were sustained, which the defendant could have approached or traversed within the meaning of the statute, as pleaded in the third count of the information and of which the defendant was found guilty."

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This motion was denied and an exception duly entered.

Counsel for defendant contend there was no evidence from which the jury could find the defendant was approaching and traversing a bridge or steep descent, and the only testimony given upon the trial shows there was no bridge and defendant was driving his automobile up a slight grade. There was no testimony showing a bridge and the testimony relating to the grade of the street was extremely meager.

The statute, section 4817, 1 Comp. Laws 1915, so far as it relates to the third count, provides:

"Upon approaching an intersecting highway, a bridge, dam, sharp curve or steep descent, and also in traversing such intersecting highway, bridge, dam, curve or descent, a person operating a motor vehicle shall have it under control and operate it at such speed as is reasonable and proper, having regard to the traffic then on such highway and the safety of the public."

The statute means just what it says about approaching or traversing a *steep descent,* and the pleader, judging from the third count, clearly understood its meaning, for he pleaded the exact language of the statute.

There was a fatal variance between the third count and the proofs. If there was no steep descent in the street then defendant has been convicted where he should have been acquitted, and if he was guilty of criminal recklessness, as charged in the first count, then he has been acquitted where he should have been found guilty. The acquittal under the first and second counts sheared the third count of every essential element of the crimes charged in the first and second counts, and prevented a verdict of guilty for criminal recklessness in driving, unless he did so while approaching or traversing a steep descent.

Counsel for the people evidently overlook the fact

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that defendant was acquitted by the verdict of the jury of the charge made in the first count, for they say in their brief:

"It is our contention that whether or not there was any bridge or steep descent this defendant is charged to have operated an automobile on Fourteenth avenue in the city of Detroit at an unreasonable and improper rate of speed and without regard to the traffic then and there on said highway and street and without regard to the safety of the public and persons then and there on said highway and street, contrary to the provisions of section 4817 of the Compiled Laws of the State of Michigan for the year 1915. And if the defendant so operated a motor car in violation of the law and without regard to the rights of others he would be guilty under the third count of this information even though there was no bridge or steep descent. Mere operation of an automobile without regard to traffic and the rights of others on the highway is forbidden by the statute referred to in the information, and the language used in the third count of the information is the language of the statute, so that it is our contention that that element is not a necessary element in the proof of this case."

All here said relates directly to the charge in the first count and of this defendant stands acquitted.

Counsel also say:

"But we need not stop there because there is evidence to justify the charge (third count). In finding that this element of the charge was proven in the testimony of Joe Sarri, he said, 'We were working on a kind of a hill,' and John F. Lewandowsky testified 'You understand I was when the accident occurred driving down the grade. Just started down the grade.' And this was directly after the respondent had passed the witness going as the witness says 25 or 30 miles an hour, a pace, which according to the testimony of the witness Thompson was increased rather than diminished as the defendant drove down through and under the viaduct. Moreover the jury visited the scene of this accident and viewed the entire surroundings and saw just what the conditions

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were. And is this court going to say there was no evidence before this jury to establish a specific element which counsel for defendant says is absent from the proof of this offense?"

We will point out the fallacy of this argument. It is true Joe Sarri, one of the workmen, testified, "we were working on a kind of a hill," and that is all he did say upon the matter here involved. Perhaps it is unnecessary to say that this testimony does not show whether the "kind of a hill" was lower or higher than the street at the viaduct, and such testimony, without further explanation, did not warrant an inference that defendant was approaching or traversing a steep descent. The testimony of Mr. Lewandowsky, quoted by counsel, shows on its face that the grade he was driving down was on the other side of the viaduct.

Stephen Walsh, a witness called by the people, testified:

"There is a considerable grade underneath the viaduct before you get to Kirby avenue, not directly under the viaduct, but I think starts from the viaduct and comes up to Kirby. I don't know how far it is from Kirby avenue to the viaduct, it may be 200 feet or it may be more."

The place where the workmen were struck was between the viaduct and Kirby avenue, a little over 100 feet north of the viaduct. This testimony of Mr. Walsh completely negatived the charge that defendant was approaching or traversing a steep descent, and was the only testimony in the case directly bearing upon the subject. But it is claimed, as we understand the argument of counsel, the jury had a view of the *locus in quo* and had a right to consider such view in reaching a verdict. No view by a jury can authorize a conviction contrary to evidence offered by the prosecution at the trial. A view is permitted to enable the jury to better understand the evidence but

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never to supply evidence, and especially not to support a verdict of guilty contrary to the only evidence offered by the prosecution at the trial. *Close* v. *Railway Co.*, 73 Mich. 647, 652.

In *Chute* v. *State*, 19 Minn. 271, 281, the court stated:

"We think the court below misconceived the proper purpose of a view by a jury. The view is not allowed for the purpose of furnishing evidence upon which a verdict is to be found, but for the purpose of enabling the jury better to understand and apply the evidence which is given in court.

"If this were not so, then in every case of a view it would be impossible to determine whether the verdict was justified by the evidence or not, since whatever the jurors might see upon the view could not be presented in a case reporting the testimony. * * * Besides this, the parties have, for the most obvious reasons, a right to know just what evidence is submitted; but this cannot be if every juror is to be permitted to look up facts on his own account."

See, also, *Schultz* v. *Bower*, 57 Minn. 493 (59 N. W. 631, 47 Am. St. Rep. 630).

Upon this point we do not consider the affidavit of the grade separation engineer of the city of Detroit, filed with the motion for new trial, and showing a slight rise in grade from the viaduct to the place of the accident. Defendant's motion for a new trial should have been granted.

Upon this record we must reverse the case; the submission of the charge in the third count to the jury and defendant's conviction thereunder presents error so clear and so prejudicial to the rights of defendant that the conviction cannot be saved under section 14565, 3 Comp. Laws 1915.

Many errors are assigned to the admission and rejection of testimony and refusal of requests to charge. They have been examined and call for no comment

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under the above holding beyond stating that none present reversible error.

For the reason pointed out the conviction is set aside and a new trial granted.

FELLOWS, C. J., and CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

KUTCHAI *v.* MORETON.

1. CARRIERS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE — DEGREE OF CARE REQUIRED.

   A passenger upon a street car must exercise a degree of care commensurate with the obvious dangers, or such as are within the comprehension of persons of ordinary foresight and prudence.

2. NEGLIGENCE — CONTRIBUTORY NEGLIGENCE — EVIDENCE—QUESTION FOR JURY.

   Whether a boy, 12 years of age, sitting on the left side of a street car, who sustained an injury to his left arm by a passing truck, was guilty of contributory negligence in resting his arm upon a window sill with some part of the arm protruding outside of the window, *held*, under the circumstances of the case, a question of fact for the jury.

Error to Wayne; Brown (William B.), J., presiding. Submitted January 6, 1922. (Docket No. 53.) Decided March 31, 1922.

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Case by Samuel Kutchai, an infant, by his next friend, against E. Foster Moreton, doing business as the Moreton Truck Company, for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Keena, Lightner, Oxtoby & Hanley, for appellant.

Leon Dreifuss (*William Henry Gallagher*, of counsel), for appellee.

WIEST, J. On a summer afternoon, plaintiff, a boy 12 years of age, was a passenger on a street car in the city of Detroit, and occupied a seat on the left side of the car, and rested his left arm upon a window sill, with some part of the arm protruding outside of the window. Plaintiff testified he did not know whether any part of his arm protruded beyond the window opening, but a witness called by defendant testified plaintiff's elbow rested upon the window sill and his forearm hung down along the outside of the car. The street car was proceeding west on the north track on Jefferson avenue, a very busy street, and when near Field avenue, a truck belonging to defendant and going east on Jefferson avenue scraped or side-swiped the street car and came into contact with and occasioned a compound fracture of plaintiff's left forearm. Plaintiff recovered judgment in the circuit court; the question of his contributory negligence being submitted to the jury.

The sole question presented here is whether plaintiff was guilty of contributory negligence, as a matter of law, in permitting his arm to project beyond the car window. It is the claim of counsel for defendant that it is negligence *per se* for a passenger on a street car in a great and busy city like Detroit, to protrude any part of his arm beyond the window.

The question seems to be one of first impression in

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this State, except as we touched upon it in *Corey* v. *Hartel*, 216 Mich. 675.

Double tracks are laid on Jefferson avenue, and the car on which plaintiff was riding was on the track to the north of the center of the street, and under the traffic regulations the truck driven by defendant's employee in going east was required to keep to the south of the center of the street.

We cannot announce an arbitrary rule of law relative to the position a passenger upon a street car must assume. It is sufficient to say that a passenger upon a street car must exercise a degree of care commensurate with the obvious dangers, or such as are within the comprehension of persons of ordinary foresight and prudence.

Had plaintiff canvassed the possibility of danger in resting his arm on the window sill with his forearm hanging down the side of the car, if he so placed his arm, he would have sensed the fact that he was seated where street traffic had no right to come near that side of the car, and that the car was on a wide paved street where there were no poles or anything else likely to strike him. Plaintiff was not bound to anticipate violations of traffic regulations and to hold himself prepared to avoid injury thereby.

Pollock on Torts (9th Ed.), p. 41, is cited with approval in *Cashmore* v. *Chief Commissioner*, 20 C. L. R. (Austr.) 1 (8 British Ruling Cases, 650), and is applicable here:

"If men went about to guard themselves against every risk to themselves or others which might by ingenious conjectures be conceived as possible, human affairs could not be carried on at all. The reasonable man, then, to whose ideal behavior we are to look as the standard of duty, will neither neglect what he can forecast as probable, nor waste his anxiety on events that are barely possible. He will order his

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precaution by the measure of what appears likely in the known course of things."

The defendant cannot be heard to say that the negligent disregard of human safety by the driver of the truck was conduct to be reasonably apprehended by plaintiff in riding in the street car. We cannot hold, as a matter of law, that a person of ordinary prudence should have apprehended the possibility of danger from some vehicle, driven in violation of traffic regulations, side-swiping the street car.

In *Georgetown, etc., R. Co.* v. *Smith,* 25 App. D. C. 259 (5 L. R. A. [N. S.] 274), it was stated:

"When passengers upon railroads operated by steam have received injuries by reason of the protrusion of their arms out of open windows, the courts, in considering such cases, have differed as to whether such protrusion is, as matter of law, contributory negligence. There has also been some conflict of decisions when the injured persons have been passengers upon street cars, but the weight of authority is that the question of negligence is a question of fact for the jury, and not a question of law to be ruled upon by the court."

In *Seigel* v. *Eisen,* 41 Cal. 109, the plaintiff, while standing on the rear platform of a street car, with his hand on the railing, had his hand hurt by a wheel of defendant's dray as it passed the rear of the car, and the court held that plaintiff's contributory negligence, if any, was a question for the jury.

In *Cummings* v. *Railroad Co.,* 68 Kan. 218 (74 Pac. 1104, 1 Ann. Cas. 708), a passenger on a summer street car leaned his head out of the car to hear what was said by another passenger two seats ahead and was struck by a trolley pole, and it was held the question of contributory negligence was one of fact for the jury.

In *Gage* v. *Transit Co.,* 211 Mo. 139 (109 S. W. 13), it was held:

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"It is the well-settled law of this State, and elsewhere, that it is not negligence, as a matter of law, for a passenger on a street car to protrude a portion of his body out of the car in which he is being carried, but such question is one of fact to be determined by the jury, under proper instructions from the court; the test being whether or not the ordinarily prudent person would do the same act under the same or like circumstances."

The same rule was applied in *Gardner* v. *Railway Co.*, 223 Mo. 389 (122 S. W. 1068, 18 Ann. Cas. 1166).

The question whether the plaintiff was guilty of negligence contributing to his injury was one of fact, and in determining that question the manner in which he was sitting, the position of his arm, the risk, if any, such position necessarily exposed him to under ordinary conditions, which might reasonably be expected to exist, were to be considered by the jury; but the question was not one of law, to be determined by the court. *Pell* v. *Railroad Co.*, 238 Ill. 510 (87 N. E. 542); *Elliott* v. *Railway Co.*, 18 R. I. 707 (28 Atl. 338, 31 Atl. 694, 23 L. R. A. 208); *Dahlberg* v. *Railway Co.*, 32 Minn. 404 (21 N. W. 545, 50 Am. Rep. 585); *Francis* v. *N. Y. Steam Co.*, 114 N. Y. 380 (21 N. E. 988); *Tucker* v. *Railway Co.*, 53 App. Div. 571 (65 N. Y. Supp. 989); affirmed 169 N. Y. 589 (62 N. E. 1101).

We have examined the case of *Terminal Co.* v. *Hancock*, 75 Ohio St. 88 (78 N. E. 964, 6 L. R. A. [N. S.] 997, 8 Ann. Cas. 1036, 116 Am. St. Rep. 710), where it was held:

"It is negligence as matter of law for a passenger traveling on a rapidly moving railroad car to intentionally and needlessly project his arm or a part thereof out of the window of the car."

The court there applied to passengers upon street railways the rule of negligence adopted by some courts with reference to passengers on steam railroads. We

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have examined the authorities with reference to passengers upon steam railroads and find a great diversity of opinion, not only in the cases but also in the text books. We do not undertake in this case to determine what would be negligence on the part of a passenger on a steam railroad car but confine ourselves to the question of negligence on the part of a passenger on a street car. We decline to adopt any arbitrary rule relative to the position a passenger on a street car may reasonably be allowed to assume. We are not prepared to say that to protrude an arm to some extent outside the window of a street car is always and under all circumstances negligence, but feel that each case must stand upon its own facts; and what is, or is not, ordinary prudence, as to the position which one shall assume when sitting at the open window of a street car, is one of fact for the jury. The question of plaintiff's contributory negligence was properly submitted to the jury.

The judgment is affirmed, with costs to plaintiff.

FELLOWS, C. J., and CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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FRENCH *v.* MULHOLLAND.

PARTNERSHIP — DISSOLUTION — FRAUD — ACCOUNTING — ADEQUATE REMEDY AT LAW.

Where a partner accepted a give or take proposition made by his copartner, and later discovered that he had been defrauded by the failure of his copartner to account for all the profits of the partnership previous to the sale, his affirmance of the sale to himself affirmed the dissolution of the copartnership, and his remedy for the fraud is an action at law and not by bill in equity for an accounting.

Appeal from Muskegon; Vanderwerp (John), J. Submitted January 19, 1922. (Docket No. 40.) Decided March 31, 1922.

Bill by Hart P. French against Arthur J. Mulholland for an accounting. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Cross, Foote & Sessions, for plaintiff.

James E. Sullivan, for defendant.

WIEST, J. French and Mulholland, as copartners, were engaged in conducting an amusement park, and desiring to sever the relation by one purchasing the interest of the other, a give or take proposition was made by Mr. Mulholland and accepted by Mr. French.

Mr. French paid the agreed price and claimed he later discovered that Mr. Mulholland, while manager, had not accounted for all the profits, and filed the bill herein to have an accounting relative to specified items he claims were received and retained by defendant and for a money decree for such amount as might be found due him. It is alleged in the bill:

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"That at and before the time of the dissolution of the said partnership the said defendant represented to this plaintiff that he, the said defendant, had accounted for all of the moneys of the said partnership and partnership business which had come to his hands, and has paid to this plaintiff his full share thereof; that plaintiff relied upon such representations of said defendant and believed the same to be true and was deceived thereby; that since the dissolution of the said partnership plaintiff has ascertained that said representations so made by the said defendant to plaintiff were not in fact true and that said defendant had not accounted to plaintiff for all of the moneys of the said partnership and partnership business which had come to the hands of defendant, and had not paid to plaintiff his full share thereof; and said defendant had not accounted to plaintiff for large sums of money belonging to said partnership business, which partnership moneys had come to the said defendant during the season of 1918, and that the said defendant had not charged himself with large sums of money which he had taken out of said partnership business for his own individual use and benefit during the said season of 1918. That at the time of the purchase by this plaintiff of the said defendant's interest in said partnership business, and at the time of the dissolution of the said partnership, the said defendant made false representations to this plaintiff as to the amount due to said partnership on open accounts, and which accounts this plaintiff accepted from defendant in lieu of money. That as nearly as this plaintiff can now estimate the same, the said defendant has failed to account to plaintiff for upwards of $2,000 of the partnership moneys coming to defendant's hands during the season of 1918, said failure and default of said defendant being herein specifically stated and set forth." * * *

Then follows a statement of the items claimed to be involved. Defendant denied the charges made against him. Plaintiff elected not to rescind. At the close of the plaintiff's proofs the trial judge dismissed the bill, holding plaintiff's remedy, if any, lay in an action at law.

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Has plaintiff an adequate remedy at law? The acceptance of the give or take proposition by plaintiff put an end to the partnership relation, and in the absence of fraud or deceit operated as an adjustment and settlement of their partnership affairs. Plaintiff alleges fraud and deceit and seeks to go back of the adjustment and settlement and recover sums received for the partnership by defendant and kept from the knowledge of plaintiff at the time of the settlement. Plaintiff, by affirming the sale to him, has affirmed the dissolution of the copartnership and the settlement, except as he may, if he has been defrauded, have a remedy for the fraud and deceit practiced upon him. If plaintiff has suffered loss in adjusting the partnership relation with defendant, through fraud or deceit of defendant, his remedy does not lie in a partnership accounting, but in an action planted upon such fraud and deceit. The allegations in the bill charge fraud and deceit on the part of the defendant and that the settlement of the partnership affairs was brought about thereby. Plaintiff insists he has a right to maintain this suit and go into the specific matters alleged in the bill.

Daniel v. *Gillespie*, 65 W. Va. 366 (64 S. E. 254), is cited by plaintiff as authority in support of his right to maintain this suit. The plaintiff in that case filed a bill to set aside his purchase of his copartner's interest in a store, and to cancel his negotiable promissory notes given therefor and to settle and wind up the partnership business. Clearly in that case matters of equitable cognizance appeared. Plaintiff in this case had a right to impeach the settlement with his copartner, for the fraud and deceit alleged, if practiced upon him, but such is not the remedy he seeks. The allegations in the bill state an action for fraud and deceit in making a settlement of the part-

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nership affairs and plaintiff elected to have such settlement stand.

In *Crockett* v. *Burleson*, 60 W. Va. 252 (54 S. E. 341, 6 L. R. A. [N. S.] 263), a case quite similar to the one at bar, the plaintiff, without rescinding, brought suit to recover damages for deceit practiced upon him by defendant in their settlement of their partnership affairs. The court stated:

"The single question presented here is: Can this action at law for the alleged deceit be maintained by the plaintiff against the defendant, his former partner? * * * It is contended that this action for alleged deceit is not cognizable at law, because the partnership relation existed between plaintiff and defendant when the alleged deceit was practiced, and because the alleged deceit related to the state of the indebtedness owing to the firm, and because this action necessarily involves a re-opening and re-settlement of the partnership accounts and business. * * * In the case at bar, the partnership has been finally settled and dissolved. The partnership relation no longer exists. The wrong complained of does not involve in this action a re-opening or re-adjustment of the partnership business or accounts. The contract of settlement and dissolution stands without rescission. The ground of action is in no way connected with the state of the partnership accounts or business, except that the deceit is alleged to have been practiced in relation to the state of the indebtedness owing to the firm before the dissolution."

It was held that the action at law could be maintained.

In the instant case the plaintiff in his bill does not ask for a re-opening or re-adjustment of the partnership business or accounts; he does specify certain accounts upon which he desires judicial determination as between himself and the defendant. We think the question here involved was answered in *Farnsworth* v. *Whitney*, 74 Me. 370:

"When the two members of which a firm is com-

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posed, settle their partnership affairs and dissolve, and one of them takes an assignment of the other's interest in the partnership property, paying therefor a sum agreed upon by them, and assumes the payment of the partnership debts, the effect of the arrangement is to extinguish the assignor's indebtedness to the firm. Such an arrangement implies that the assignor is to retain whatever he has already received from the firm, in addition to the consideration mentioned in the assignment. It is in effect an agreement that the sum paid is a balance due him after deducting what he has already received. No other rational interpretation can be put upon such an arrangement. It is impossible to believe that the one would pay or the other receive the sum agreed upon, unless all existing claims between them were to be thereby adjusted and settled. * * * If one of the parties is defrauded in the settlement (of which the want of proper entries may be strong evidence), the law furnishes him with two remedies; he may rescind the settlement, or bring an action on the case for the deceit. If he elects to rescind, he must do so promptly, upon discovery of the fraud, and restore whatever he has received under the settlement. If this is done, the parties are restored to their former rights, and made subject to their former liabilities. If, in consequence of the lapse of time, or a change of circumstances, a rescission has become impossible or undesirable, the injured party may still obtain ample redress by resort to an action on the case for deceit."

Plaintiff has an adequate remedy at law, and the learned circuit judge was right in holding that the equity court had no jurisdiction.

The decree is affirmed, but the case is remanded in order to give plaintiff an opportunity to move that the suit be transferred to the law side of the court under the provisions of section 12351, 3 Comp. Laws 1915. Defendant will recover costs.

FELLOWS, C. J., and CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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INNIS v. FIREMAN'S FUND INSURANCE CO.

1. INSURANCE — MICHIGAN STANDARD POLICY — RIGHT OF ACTION WHILE AWARD OF APPRAISERS UNREVOKED.

   An action at law upon a Michigan standard policy may not be maintained by insured for a loss by fire while an award by appraisers under the provisions of Part 4, chap. 2, § 6, Act No. 256, Pub. Acts 1917, stands unrevoked; his remedy, if any, being in equity to avoid the award.

2. SAME—CONTRACTS—CONSTITUTIONAL LAW—AGREEMENT TO MAKE AWARD OF APPRAISERS BINDING.

   Where the legislature prescribes a standard form of insurance policy, fixing therein terms, conditions, obligations, and method of determining liability and procedure to enforce same, insurance thereunder becomes a matter of contract subject to such statutory regulations, and an insured cannot successfully claim that his constitutional right to a jury trial has been thereby taken away.

3. STATUTES — CONSTITUTIONAL LAW — TITLE OF ACT—TRIAL BY JURY.

   Plaintiff's contention that Act No. 256, Pub. Acts 1917, is unconstitutional because its title does not indicate the purpose of abrogating the constitutional right of trial by jury is without force, since it is the contract of insurance, and not the statute, which abrogates said right.

4. INSURANCE — AWARD OF APPRAISERS—FAILURE TO STATE SEPARATE ITEMS OF DAMAGE.

   Nor may plaintiff maintain an action upon the failure of the appraisers to state separately the sound value and loss or damage of each item of the policy.

Error to St. Clair; Hart (Ray), J., presiding. Submitted January 31, 1922. (Docket No. 70.) Decided March 31, 1922.

Assumpsit by George A. L. Innis against the Fireman's Fund Insurance Company on a policy of insur-

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ance. Judgment for defendant *non obstante veredicto.* Plaintiff brings error. Affirmed.

John B. McIlwain, for appellant.

Phillips & Jenks, for appellee.

WIEST, J. This is an action upon a Michigan standard fire insurance policy issued to plaintiff by defendant company and covering household furniture, furnishings, etc. A fire occurred in the basement of plaintiff's house, and while none of the furniture or furnishings were destroyed a greasy smoke injured the household effects. Plaintiff presented a schedule of his claimed damages and the adjuster for the company demanded an appraisal of the loss in accordance with the terms and conditions of the policy. Thereupon the parties agreed upon appraisers and stipulated that their estimate of the damage should be binding. The appraisers selected an umpire, but his services were not required as the appraisers agreed and made an award as follows:

"We have carefully examined the premises and remains of the property hereinbefore specified, in accordance with the foregoing appointment, and have determined the sound value immediately preceding the fire to have been one thousand dollars, and the loss and damage to be one hundred seventy-four and 46/100 ($174.46) dollars."

Claiming that the award was so inadequate and unjust as to show bias and prejudice and a failure to make due investigation of the facts, that the appraisal and award should be declared void, plaintiff brought this action and upon trial before a jury succeeded in having his damages assessed at $1,000.

By plea and timely objections defendant insisted that plaintiff was bound by the award and could not attack the same except in a court of equity. The evidence fails to disclose any fraud on the part of the

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appraisers. Upon motion of defendant the trial court entered judgment *non obstante veredicto* in favor of plaintiff for $174.46, that being the amount of the award. Plaintiff brings the case here by writ of error.

The following questions are presented:

(1) Does the statute make the appraisal and award conclusive and binding upon the parties, precluding an action at law to determine the amount of the loss?
(2) Does the award become conclusive by the parties entering into the appraisal?
(3) Can the validity of the appraisal be inquired into in an action at law or must resort be had to a bill in equity?

It is contended that the statute (Act No. 256, Pub. Acts 1917, pt. 4, chap. 2, § 6), providing that the award of the appraisers shall determine the amount of loss or damage, and that:

"No suit or action on this policy, for the recovery of any claim, shall be sustainable in any court of law or equity unless all the requirements of this policy shall have been complied with, nor unless commenced within twelve months next after the liability shall have accrued,"

does not make the award binding and conclusive and does not preclude an action at law on the policy to determine the amount of the loss. This is the pivotal question in the case.

The provision of the statute relative to method of determining the loss and consequent extent of liability of the company is meaningless if no one is bound thereby, and the award can be cast aside and an action at law bring the assessment of the loss anew before a jury. Instead of avoiding litigation this would but stretch it out and the appraisal and award would be no more than a senseless preliminary to a law suit.

We had occasion in the late cases of *Palmer* v. *Insurance Co.*, 217 Mich. 292, and *Jackson* v. *Insurance*

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Co., 217 Mich. 301, to pass upon the principle here involved, and we held that the remedy to avoid an award, if any, is in equity and not in an action at law.

Counsel for plaintiff urges that:

"Actions at law on policies of insurance to determine the amount of the loss or any other question arising thereunder are properly triable and only triable in the common law courts with a right to a jury. It is a constitutional right of the assured to have his case so tried. To the extent, therefore, that this act shall be construed to deprive the plaintiff of the right of trial by jury it is unconstitutional and void."

The legislature may prescribe a standard form of insurance policy and fix therein terms, conditions, obligations and method of determining liability and procedure to enforce the same, and when such has been done, insurance thereunder becomes a matter of contract subject to such statutory regulations, and an insured cannot successfully claim that his constitutional right to a jury trial has been taken away. His contract takes away such trial, and if the statute should not so provide the remedy is with the legislature and not the courts.

Plaintiff also contends that the title to the act of 1917 does not indicate the purpose of abrogating the constitutional right of trial by jury, and the act is, therefore, void. As before pointed out the act does not abrogate the constitutional right of trial by jury. Plaintiff's contract of insurance, voluntarily entered into, made binding upon him the lawful and time-honored method of determining his loss or damage as fixed by statute and without trial by jury. This was followed by express agreement, adopting the statutory method and resulting in his obtaining an appraisal of his damages. With such appraisal standing unimpeached he cannot in a suit at law treat the

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statutory provision, and his agreement thereunder for appraisal of his damages, as without any determinative or binding force.

The learned circuit judge was clearly right in entering the judgment for the amount of the loss or damage determined by the appraisers. Plaintiff cannot plant any right to maintain this suit upon the failure of the appraisers to state separately the sound value and loss or damage of each item of the policy.

The judgment is affirmed, with costs to defendant.

FELLOWS, C. J., and BIRD, MOORE, and STEERE, JJ., concurred with WIEST, J.

SHARPE, J. (*concurring*). The appraisal agreement referred to by Mr. Justice WIEST provided that the persons named therein—

"shall appraise and estimate, at the true cash value * * * the amount of actual loss and damage caused by fire * * * which appraisement and estimate by them * * * shall be binding upon all parties to this agreement."

In my opinion, the provision for appraisement in the policy was superseded by this agreement and the plaintiff is bound thereby. *Morley* v. *Insurance Co.*, 85 Mich. 210; *Bangor Savings Bank* v. *Insurance Co.*, 85 Me. 68 (26 Atl. 991, 20 L. R. A. 650, 35 Am. St. Rep. 341); Joyce on Insurance, § 3250. Its validity may not be assailed in an action at law on the policy.

As to whether an appraisal made pursuant to the provision of the statute is conclusive of the amount of the loss, I express no opinion.

CLARK, J., concurred with SHARPE, J.

The late Justice STONE took no part in this decision.

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STERN CO. *v.* FRIEDMAN.

1. CONTRACTS—BREACH OF CONTRACT—RIGHT OF ACTION—EQUITY.
   Where plaintiff had a lease with defendant with option of renewal for five years, and defendant refused to renew, plaintiff's remedy was an action at law for the breach of the contract and not a bill in equity asking solely for damages.

2. SPECIFIC PERFORMANCE—PLEADING—DAMAGES.
   Where specific performance is not asked for, none can be granted under the allegations of a bill asking solely for damages.

3. EQUITY — JURISDICTION — MULTIPLICITY OF SUITS — BREACH OF CONTRACT.
   A suit in equity for damages for the breach of a contract to renew a lease cannot be maintained on the ground that it will avoid a multiplicity of suits at law as damages on account of the breach accrue, since it does not constitute a multiplicity of suits, within equity cognizance, where the right of action arises out of a single transaction between the same parties, and suits for damages for breach thereof, after the initial suit, must await accrual of such damages.

Appeal from Kent; McDonald (John S.), J. Submitted January 25, 1922. (Docket No. 140.) Decided March 31, 1922.

Bill by the Stern Company against Morris Friedman, surviving partner of M. Friedman & Company, for damages for failure to exercise an option for the renewal of a lease. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Jewell & Smith, for plaintiff.

Travis, Merrick, Warner & Johnson, for defendant.

WIEST, J. Morris Friedman and Joseph Roth, as

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copartners, on January 15, 1915, by written lease, rentcd from Alexander W. Hompe, owner, a certain store building in Grand Rapids, for the term of five years, with an option right to renewal as follows:

"I (Hompe) hereby agree to renew this lease for a further period of five years from the expiration hereof upon the same terms and conditions herein contained, except that the rent, which shall be determined by arbitration at least six months before the expiration hereof, shall not be less than five thousand dollars per year, plus taxes, assessments and insurance."

On June 10, 1916, Friedman and Roth leased to plaintiff for a term of three years and six months all of the premises except the ground floor and basement, with a renewal option agreement as follows:

"It is further agreed that said second party (The Stern Company) may, at its option, renew and extend this lease for a further period of five years from the expiration hereof, at a rental to be agreed upon between the parties hereto, or determined by arbitration, but it shall not be less than five thousand dollars per annum, written notice of its intention to exercise such option to be given not later than January 1, 1919, and upon such notice being given said first parties of the first part shall forthwith exercise their option with the owner of said premises for such renewal and extension and proceed to carry into effect for the benefit of said second party all rights and privileges of renewal to which they are entitled under their lease from the owner of said premises and in determining the rental for such additional period, the amount received as rent for the remaining portion of the premises described in the lease between first parties and the owner or a fair *pro rata* rental value thereof shall be taken into consideration and due allowance made therefor to said second party."

Plaintiff went into possession and in December, 1918, gave notice to defendant of its intention to exercise its option to renew and extend the lease for the further period of five years from the expiration there-

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of, at a rental to be agreed upon as in said lease provided.

Defendant, as surviving partner of the copartnership of Friedman and Roth, refused to exercise the option and have the lease from Hompe renewed and refused to renew the lease to plaintiff, claiming that both options were void for uncertainty of method for determining the rent. Plaintiff thereupon rented the premises from the owner, and in order to do so had to take over portions of the premises claimed to be of no value to plaintiff and to pay $5,000 per year, plus taxes, assessments and insurance upon the property. If defendant had exercised the option for a renewal with the owner he would have had to pay at least $5,000 per year, plus taxes, assessments and insurance, but as stated such lease covered more of the premises than rented to plaintiff.

In this suit plaintiff asks:

"That upon the trial and hearing of this cause, a decree be entered, directing the defendant to pay the plaintiff such sums of money as shall then be determined to have been paid by the plaintiff for repairs and remodeling the Ottawa avenue premises and for taxes, assessments or insurance upon said property.

"That upon the trial and hearing of said cause, a decree be entered therein compelling the defendant to pay to the plaintiff or to the owner of the property for the benefit of the plaintiff as they shall become due and payable hereafter during the extended term of said original lease all taxes and assessments that shall be levied upon or against said property and all insurance premiums which shall be carried thereon under the direction of and to the satisfaction of the owner of said premises and within the terms of the lease agreement."

Defendant in his answer claimed that plaintiff in its bill had stated no equitable cause of action. Upon defendant's motion to dismiss the bill the circuit judge held that the option agreement was so uncertain in

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its method of determining the rent as to be unenforceable and dismissed the bill.

The case is here on appeal and we are confronted with the question of the right of plaintiff to come into the court of equity with a case asking solely for damages for a breach of contract. The written agreement between the parties presents only a question of law, and if valid it must admit of the determination of such damages in an action at law.

It is claimed in the brief for plaintiff that:

"The parties have rights requiring the determination of the legal effect of this lease and the extension agreement, and a decree settling the questions involved and practically granting specific performance by way of imposing obligations upon the one who has broken his contract, is, therefore, within the jurisdiction of an equity court."

No specific performance is asked for and none can be granted under the allegations in the bill. The legal effect of the lease and option for renewal and damages for breach thereof present no equitable questions.

A careful consideration of the issues presented leads us to hold that plaintiff, if entitled to recover damages, has an adequate remedy at law, and the bill states no case for consideration on the equity side of the court. See *Laubengayer* v. *Rohde*, 167 Mich. 605; *Pulezer* v. *Kucharzyk*, 116 Mich. 92; *Lee* v. *Hedenskoog*, 200 Mich. 427.

This suit cannot be maintained in equity on the ground that it will avoid subsequent suits at law as damages on account of the breach of the contract accrue. It does not constitute a multiplicity of suits, within equity cognizance, where the right of action arises out of a single transaction, between the same parties, and suits for damages for breach thereof, after the initial suit, must await accrual of such damages.

Under 3 Comp. Laws 1915, § 12351, plaintiff may

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have the case transferred to the law side of the court, and the case is remanded to the circuit court for such proceeding in accordance with this opinion and the statute. If plaintiff does not move for such transfer within twenty days the bill will stand dismissed but without prejudice. Defendant will recover costs.

FELLOWS, C. J., and CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

In re CARLSON'S ESTATE.

SWENSON *v.* BARRETT.

1. WILLS—UNDUE INFLUENCE—EVIDENCE — MERE OPPORTUNITY INSUFFICIENT.

   In proceedings to contest a will on the ground of undue influence, there must be a showing of something more than mere opportunity and unequal distribution of the property, to constitute undue influence invalidating the will.

2. SAME—EVIDENCE OF EXPRESSED WISH INSUFFICIENT.

   Testimony that testatrix had acquiesced in the expressed wish of her husband that their children should share equally in the property is insufficient proof of undue influence in the making of a will leaving the bulk of the property to one daughter with whom testatrix made her home.

3. SAME—FIDUCIARY RELATIONS—LEGALITY OF BEQUEST.

   That testatrix was living in the home of proponent at the

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time of the making of the will does not establish a fiduciary relation between them militating against the bequest to proponent.

Error to Kent; Brown (William B.), J. Submitted January 18, 1922. (Docket No. 90.) Decided March 31, 1922.

Ida Swenson presented for probate the last will of Anna L. Carlson, deceased. The will was allowed in the probate court, and Tillie Barrett and another appealed to the circuit court. Judgment for proponent *non obstante veredicto*. Contestants bring error. Affirmed.

Smedley, Linsey & Shivel, for appellants.

Hatch, McAllister & Raymond, for appellee.

WIEST, J. This is a contest over the will of Anna L. Carlson, who at the time of her death was 87 years of age. Proponent and contestants are daughters, of mature years, of the testatrix. June 5, 1920, the will was executed, and July 14th following the testatrix died from pleurisy. She came to this country with her husband from Sweden about 45 years ago, and they acquired a small farm upon which they lived at the time of the death of her husband, February 1, 1920. The inventory of the estate shows the value of the real estate to be $4,500 and personal property $415. The will was duly allowed in the probate court, and an appeal taken to the circuit court where contestants claimed their mother was mentally incompetent and the will was the result of undue influence practiced by proponent. The issues came on for trial, and at the close of the proofs counsel for proponent moved the court to direct a verdict sustaining the will, on the ground that no evidence had been given justifying the submission of the issues of mental incom-

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petency and undue influence to the jury. The learned trial judge expressed some doubt at that time, but left the issues to the jury with permission to proponent to renew the motion, if necessary, for judgment *non obstante veredicto.* The jury returned a verdict against the will and, in answer to special questions submitted by contestants, found the testatrix was mentally competent but undue influence was practiced in obtaining the will. Thereupon the trial court, on motion of proponent, entered judgment sustaining the will, holding there was no evidence to go to the jury upon the issues presented by contestants. The contestants bring the case here and ask that the judgment so entered be set aside and judgment ordered entered in accordance with the verdict.

The verdict of the jury may be considered as ending the contest as to the mental competency of the testatrix, and we will consider the question of whether there was evidence to go to the jury upon the issue of undue influence, and upon this we must have in mind the fact that the testatrix was mentally competent to make the will. There was no direct testimony showing any acts of undue influence practiced by proponent or any one else in her behalf, but it is claimed there was opportunity for undue influence while testatrix lived at the home of proponent and the will shows that it was contrary to the former expressed intention of testatrix. There must be a showing of something more than mere opportunity and unequal distribution of the property, to constitute undue influence. But it is said that the father had expressed the wish to have the children equally remembered and the testatrix agreed with him and the will departs from such intention and this is some evidence of undue influence exercised by the chief beneficiary. In *Re Haslick's Estate,* 195 Mich. 432, we held:

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"Evidence that a testator had repeatedly told his neighbors how he was going to dispose of his property and a disposition of his property not in accordance with such statements is not sufficient proof of undue influence."

Out of her little property testatrix willed proponent about $3,300 and contestant Emma Broman $1,000, and contestant Tillie Barrett $100, and at the time of executing the will explained her reasons for doing so. She first told the person who drew the will that she wanted to give Emma $800 and Tillie $1, but at the solicitation of proponent, who was with her, she finally increased the amounts as fixed in the will. This attitude of proponent bears no stamp of undue influence unless it be reasoned that it was a cunning attempt to hide her machinations. We may reasonably infer that one intent upon dictating the terms of a will in her favor and with power to do so would not be likely to so insist.

The record is too long to be reviewed in detail, and it would be of no benefit to do so. It is sufficient to say that it has been carefully examined and we find the disposition of her little property by the testatrix was not so unnatural as to admit of the inference that it was the result of undue influence practiced upon her by proponent. The disposition of the property appears to have been moved by a motherly consideration and the testatrix had in mind the relations with her daughters and their several claims upon her bounty.

We have not overlooked the fact that, at the time the will was made, the testatrix was living in the home of the proponent, and had been there several weeks, but this was a matter of necessity and agreeable to contestants, and the kindness of proponent in furnishing her old mother with a home must not be lost sight of. The relation so established was not a fiduciary one militating against the bequest to proponent.

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Severance v. *Severance*, 90 Mich. 417. We find no evidence that the relation was abused by proponent, and no facts and circumstances from which it may reasonably be inferred that the will was the result of undue influence practiced by proponent or any one in her behalf.

The circuit judge was right in entering judgment sustaining the will and the same is affirmed, with costs to appellee.

FELLOWS, C. J., and CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

BIRD *v.* ST. PAUL FIRE & MARINE INSURANCE CO.

1. INSURANCE — THEFT INSURANCE — PROOF OF LOSS—DENIAL OF LIABILITY—PRINCIPAL AND AGENT.

   In an action on a policy of insurance against the theft of an automobile, where plaintiff gave notice of his loss to the agents who issued the policy, and a man from their office took him to an adjuster of the company who denied the claim, plaintiff was justified in acting upon the belief that said adjuster was an agent of the company, and the denial excused him from proving his loss.

2. SAME—EVIDENCE—INTENT TO STEAL INFERABLE FROM EVIDENCE.

   Evidence from which the jury could reasonably infer a theft of the car was sufficient, and it was not incumbent upon plaintiff to negative conjectural defenses on the part of the person who took it.

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Error to Wayne; Dingeman (Harry J.), J. Submitted January 24, 1922. (Docket No. 129.) Decided March 31, 1922.

Assumpsit by Henry E. Bird against the St. Paul Fire & Marine Insurance Company on a policy of insurance. Judgment for plaintiff. Defendant brings error. Affirmed.

Edward A. Rich, for appellant.

Rosenthal, Rosenthal & Rosenthal, for appellee.

WIEST, J. Defendant company insured plaintiff's automobile against "theft, robbery or pilferage, excepting by any person or persons in the assured's household or in the assured's service or employment, whether the theft, robbery or pilferage occur during hours of such service or employment or not." Plaintiff loaned the car to one Jerry Monaghan, a former employee, for a half hour, to drive to the St. Dennis hotel in Detroit, and the car not being returned as agreed, he tried to locate it, and not being able to do so reported to the police that his car had been stolen. Later in the day the car was found in a badly damaged condition at the corner of Grand River avenue and Fourth street in Detroit. There was testimony that Monaghan drove the car to the hotel and there met some companions, started drinking, took his companions in the car and drove about the city and came back to the hotel and started drinking again and became so drunk that he was carried to his room. Monaghan testified that he left the car in front of the hotel and that he had the keys to the car in his pocket when he was taken to his room, but the keys were gone when he awakened and that he had not given the keys to any one, and had not given any one permission to take the car. He testified that he

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knew who took the car but would not tell their names. Plaintiff had the car repaired and brought this suit to recover the expense thereof and obtained judgment.

Defendant contends that plaintiff made no proof of loss in accordance with the terms of the policy, while plaintiff insists he was excused from doing so by the denial of liability by defendant's adjuster.

The policy provided:

"In the event of loss or damage the assured shall forthwith give notice thereof in writing to this company or the authorized agent who issued this policy."

Plaintiff testified:

"I notified the insurance company in writing of the car being stolen. * * * I had some discussion relative to the paying of this loss with Mr. Dinning, an adjuster for the St. Paul Fire & Marine Insurance Company, Leonard & Griffin, of whom I bought the insurance. A man from their office went over with me to see Mr. Dinning. I went up to Mr. Dinning's office and asked him what they were going to do about this car, and he said they were not going to do anything, that it wasn't a stolen car. I don't recall the date of this conversation, but it was within a few days after the accident. Mr. Dinning never saw the car to my knowledge, but he said there wasn't any claim at all, that the car wasn't a stolen car."

Defendant claims that the testimony failed to establish the agency of Mr. Dinning and cites *Fish* v. *Insurance Co.*, 198 Mich. 270. It is a sufficient answer to this to say that the notice to the agents who issued the policy to plaintiff made it unnecessary for him to go to an adjuster with his claim of loss, and when he did go to see the adjuster he was accompanied by a man from the office of defendant's agents and he had a right to consider, under such circumstances, the denial of his claim as excusing him from proving his loss.

It is also urged that there was no evidence tending

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to prove a theft and that the car may have been taken without intent to steal it but with intent to return it, and it was upon plaintiff to offer evidence establishing an intent to steal the car on the part of the person taking it.

"It is true, as is contended, that an essential ingredient in the crime of larceny is the existence at the time of the taking of a felonious intent to deprive the owner of his property against his will, yet whether or not such an intent existed is a question for the determination of the court or jury trying the cause. If there is evidence from which such an intent can fairly be inferred, an appellate court is not authorized to disturb a finding that such an intent existed." *Robinson* v. *State*, 113 Ind. 510 (16 N. E. 184).

"The felonious intent was a question of fact for the jury, to be inferred by them from all the facts and circumstances disclosed by the testimony." *People* v. *Griffin*, 77 Mich. 585.

It was not incumbent upon plaintiff to negative conjectural defenses on the part of the person who took the automobile. It was sufficient for him to offer evidence from which the jury could reasonably infer a theft of the car.

We quote with approval, as the supreme court of New Jersey did in *State* v. *South*, 28 N. J. Law, 28 (75 Am. Dec. 250), the following statement of the law upon the question of intent found in a well-considered note by Judge Sharswood, in the case of *The Queen* v. *Holloway*, 1 Denison's C. C. 370, 376:

"It seems to be settled law that every wrongful taking, without any color of right, with intent to deprive the owner wholly of his property, is larceny, whatever other motive may also have influenced the taker; and that no wrongful taking will amount to larceny which is not done with such intent. The question for the jury in each case will be whether the facts prove such intent.

"If it appear that the prisoner kept the goods as his own until his apprehension, or that he gave them away,

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or sold or exchanged or destroyed them, such intent may, generally speaking, be deemed proved. * * * If, on the other hand the prisoner took the goods with a view only to a temporary user, intending to keep them for a short time only, and to return them to the owner unimpaired, an intent thereby wholly to deprive the owner cannot, generally speaking, be deemed proved. * * * But if he took them with a view only to a temporary user, intending, however, to keep them for a very unreasonable time, or to use them in a reckless, wanton or injurious manner, and then to leave it to mere chance whether the owner ever recovered them or no, and if he recovered them at all, would probably recover them in a damaged or altered condition, such a taking would seem, in common sense, to be ample evidence of an intent wholly to deprive the owner of his property."

In *State* v. *South, supra*, the court remarked:

"The fact of the taking being merely for temporary use seems, therefore, not of itself to be inconsistent with an intent wholly to deprive the owner of his property, and therefore does not seem necessarily to negative the felony, but simply to be a piece of evidence which the jury may regard as showing a taking from wantonness, mistake, accident, frolic, or thievish design, according to circumstances."

Our attention is called by counsel for defendant to the case of *Hartford Fire Ins. Co.* v. *Wimbish*, 12 Ga. App. 712 (78 S. E. 265), and it is said that it is similar to the case at bar. It is. It affords, however, cold comfort to defendant for it was there held that the question of intent to steal should have been submitted to the jury. Other cases cited require but brief mention.

In *Michigan Commercial Ins. Co.* v. *Wills*, 57 Ind. App. 256 (106 N. E. 725), the testimony affirmatively showed that the car was taken by a boy for a "joy ride" and without intent to steal. The same is true, in effect, of *Valley Mercantile Co.* v. *Insurance Co.*, 49 Mont. 430 (143 Pac. 559, L. R. A. 1915B, 327, Ann.

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Cas. 1916A, 1126). In *Rush* v. *Insurance Co.*, 150 N. Y. Supp. 457, the car was taken under claim of title. In *Stuht* v. *Insurance Co.*, 90 Wash. 576 (156 Pac. 557), the car was misused by one having lawful possession. The question of intent to steal was submitted to the jury under proper instructions, and under the evidence cannot be disturbed.

We find no error, and the judgment is affirmed, with costs to plaintiff.

FELLOWS, C. J., and CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

ROBERTSON v. UNITED FUEL & SUPPLY CO.

1. PLEADING — NEGLIGENCE — INCONSISTENT COUNTS MAY BE PLEADED AGAINST DIFFERENT DEFENDANTS WHEN IN DOUBT AS TO WHICH IS LIABLE.

   Where a pleader is confronted with an uncertainty as to which of two defendants concerned in an accident occasioning injury to plaintiff should be charged to respond in damages, he may charge both defendants, but should employ separate counts, and any inconsistency in doing so is saved from defeating his action by Circuit Court Rule No. 27, § 7; but the pleader should intimate the uncertainty leading him to employ counts inconsistent in their statements.

2. SAME — TRIAL — ADMISSIONS — CONTRIBUTORY NEGLIGENCE — DIRECTED VERDICT.

   Where plaintiff pleaded inconsistent counts against his

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employer and another, in an action for personal injuries, the trial court was in error in directing a verdict in favor of the other defendant on the ground that the count against the employer was an admission of negligence on the part of the employer, who was driving the car in which plaintiff was riding when injured, which was imputable to plaintiff; nor was said error cured by a verdict subsequently rendered against the employer.

3. SAME—WAIVER.

Although plaintiff proceeded against his employer alone and recovered judgment, he did not thereby waive his right to have a review of the judgment of the trial court discharging the other defendant.

4. NEGLIGENCE—MASTER'S NEGLIGENCE NOT IMPUTABLE TO SERVANT.

The negligence of the master, in driving, is not, as a matter of law, imputable to the servant riding with the master in the course of his employment, where the servant did not participate in the driving or degree of care exercised.

Error to Wayne; Goff (John H.), J. Submitted January 20, 1922. (Docket No. 116.) Decided March 31, 1922.

Case by James Robertson against the United Fuel & Supply Company and William F. Wicks and Philip F. Weltin, individually and as copartners, for personal injuries. Judgment for plaintiff against defendants Wicks and Weltin on a verdict by the jury, and for defendant United Fuel & Supply Company on a directed verdict. Plaintiff brings error. Reversed.

Harry M. Stone and *N. Calvin Bigelow* (*F. E. Rankin,* of counsel), for appellant.

Ezra H. Frye, for defendants Wicks and Weltin.

Stevens T. Mason, for defendant United Fuel & Supply Co.

WIEST, J. Plaintiff hired out to defendants Wicks and Weltin for a day, to aid them in their light truck-

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ing business, and while about such work, riding on one of their trucks driven by defendant Weltin, going north on Cass avenue in the city of Detroit, they approached a place where a wagon belonging to the defendant United Fuel & Supply Company was backed up to or just over the curb on the west side of the street with the team facing the center of the street, and just as the truck was about to pass, the team was suddenly started and the wagon tongue struck and overturned the truck and plaintiff was injured. In the declaration filed it was charged in the first count that the accident was wholly caused by the negligence of the defendant United Fuel & Supply Company; in the second count it was charged the accident was wholly the result of the negligence of defendants Wicks and Weltin in driving the truck, and in the third count defendants were jointly charged with negligence. At the close of plaintiff's proofs the trial judge directed a verdict of not guilty as to the United Fuel & Supply Company, on the ground the count against defendants Wicks and Weltin was an admission that the driver of the truck was guilty of negligence, and such negligence was imputable to plaintiff. Thereupon plaintiff offered further proof against defendants Wicks and Weltin, and recovered a verdict against them for $1,000.

The case is here on writ of error sued out by plaintiff, and he asks that the judgment in his favor and the verdict and judgment in favor of the United Fuel & Supply Company be reversed and the case sent back for a new trial.

Plaintiff insists he had a right to frame the declaration with inconsistent counts and to have such relief as the facts warranted at the trial. In support of this position he invokes Circuit Court Rule No. 21, § 7, which provides:

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"Inconsistent causes of action or defenses are not objectionable, and when the party is in doubt as to which of two or more statements of fact is true, he may in separate counts or paragraphs allege or charge facts although the same may be inconsistent with other counts or paragraphs in the same pleading, and will be entitled to such relief as the facts may warrant, under either count or paragraph"

The rule mentions inconsistent causes of action and the question arises as to what this term means. In *Post* v. *Campau*, 42 Mich. 90, it was held:

The elements of a cause of action are (1) a breach of duty to another, and (2) a damage to the latter resulting from it.

The use of the term in the rule does not have reference to the right of the plaintiff to institute an action; but to the state of facts which give him a right to sustain an action. See 1 C. J. p. 937.

This provision in the rule is new and intended to avert the former risk of a pleader determining at his peril which of two or more statements of fact is true. If such is its purpose, and the pleader in separate counts alleges and charges inconsistent facts, the charge in one count cannot be taken as an admission against the charge in another count. If that is done then the rule is a snare instead of an aid. If the United Fuel & Supply Company could invoke the charge of negligence in the count against Wicks and Weltin as an admission absolving it from liability, then Wicks and Weltin had the same right to claim the charge against the United Fuel & Supply Company constituted an admission of their non-liability, and plaintiff would "fall between two stools."

We are of the opinion that, where the pleader is confronted with an uncertainty as to which of two defendants concerned in an accident occasioning injury to a plaintiff should be charged to respond in damages, he may charge both defendants, but should employ

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separate counts, and any inconsistency in statements in doing so is saved from defeating his action by the court rule mentioned. The pleader should, however, intimate the uncertainty leading him to employ counts inconsistent in their statements.

The learned circuit judge was in error in considering the charge against Wicks and Weltin as an admission of negligence on the part of the driver of the truck and imputable in law to plaintiff and a bar to his right to maintain his suit against the United Fuel & Supply Company. The error in so directing a verdict in favor of the United Fuel & Supply Company was not cured by the verdict subsequently rendered against Wicks and Weltin. The plaintiff now has a right, on account of such error, to go back with his case to the point where he was erroneously turned from the course he had a right to pursue.

The case is somewhat complicated by the fact that the plaintiff proceeded under the second count and recovered judgment against the defendants Wicks and Weltin. In doing this, however, he did not waive his right to have a review of the judgment of the trial court discharging the defendant United Fuel & Supply Company.

It is urged the judgment against Wicks and Weltin has determined the non-liability of the defendant United Fuel & Supply Company, because, if the accident happened by reason of the negligence of the driver of the truck, such negligence, in law, is imputed to the plaintiff who was riding on the truck.

It appears that plaintiff at the time of the accident was in the employ of the defendants Wicks and Weltin, and he was riding on the truck in pursuance of his employment, and it is claimed in his behalf that the rule imputing the negligence of the driver to one riding with him does not apply in case of employer and employee when the employer is driving.

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Our attention is called to *Lundergan* v. *Railroad Co.*, 203 Mass. 460 (89 N. E. 625), holding that the negligence of the master in driving is imputable to the servant riding with him. In that case the servant actively participated in judging whether the vehicle could safely proceed, and it was held both the employer and employee failed to exercise due care.

It is stated in 20 R. C. L. p. 159:

"If the relation of master and servant exists between the passenger and the driver—that is to say, if the passenger is the master and the driver is his servant—and the latter's negligence contributes to the injury the former suffers through the negligence of a stranger, the driver's negligence is imputable to the passenger, and the stranger is not liable."

This, we think, is the true meaning of the expression so often encountered in the books, to the effect that the relation of master and servant makes the driver's negligence imputable to the passenger. But this does not mean that an employee riding on a truck driven by his employer and while about the business he is hired to do, and has no charge of the truck and cannot direct its operation, is imputable with the negligence of his employer.

It is stated in a foot note in 8 L. R. A. (N. S.) 638:

"While the negligence of a servant driving is imputable to his master riding in the vehicle, the negligence of the master driving is not imputable to the servant. The servant has no control over the master."

In 29 Cyc. p. 545, it is said:

"The negligence of the master will not be imputed to a servant so as to prevent recovery by the latter for injuries sustained by a third person," citing cases, including *Philip* v. *Heraty*, 135 Mich. 446.

In *Lake Shore, etc., R. Co.* v. *Miller*, 25 Mich. 274, the court stated that defendant in error was guilty of negligence in fact, and while it is also stated she was

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in the employ of the driver of the wagon struck by the train, there is nothing to show whether she was with him in the course of such employment or merely on her way to town for her own convenience. We have examined the original record in the office of the clerk and find the following testimony was given upon that point:

"*Q.* Did you live with Mr. Eldridge some time?
"*A.* No, sir.
"*Q.* How long?
"*A.* I had just went there to help them clean house. I was to work in Coldwater. * * *
"*Q.* Where were you going at that time?
"*A.* Coming to Coldwater to Mr. Kibbes.
"*Q.* Where were you going?
"*A.* I was coming from the Black Hawk mills and going to Coldwater."

Upon consideration of the cases bearing upon the question, we hold the negligence of the master, in driving, is not, as a matter of law, imputable to the servant riding with the master in the course of his employment. Circumstances may be such, however, by way of participation by the servant in the driving or degree of care exercised, as to constitute the negligence of the master as well the negligence of the servant riding with him.

The judgment in favor of defendant United Fuel & Supply Company and the judgment against defendants Wicks and Weltin are both reversed and a new trial granted, with costs to plaintiff against defendant United Fuel & Supply Company.

FELLOWS, C. J., and CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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McCULLOCH *v.* VON ZELLEN.

1. EVIDENCE—BOOKS OF ACCOUNT—PAROL TESTIMONY ADMISSIBLE WHERE WITHIN PERSONAL KNOWLEDGE OF WITNESS.

   In an action by attorneys for services rendered, testimony by one of the plaintiffs as to time spent by himself and his office force in and about said employment, although said matters were more or less of record in the office, was properly received where within his personal knowledge, and there was no occasion to produce the books of account.

2. SAME—HEARSAY—CONFUSION IN RECORD.

   There was no reversible error in striking out the testimony of a witness as to what she was told, where it did not appear that the testimony related to something one of the plaintiffs had told her, but the record indicates confusion on the subject.

3. SAME—WRITING AND RECEPTION OF LETTER NOT PRODUCED QUESTION FOR JURY.

   Whether a letter, claimed to have been written by one of the plaintiffs to one of the defendants, which they had been notified to produce, was so written and received, *held*, for the jury.

4. SAME—CORRESPONDENCE—PRINCIPAL AND AGENT.

   A letter to one of the plaintiffs, written by a person employed in defendants' office acting as their agent, *held*, admissible.

5. ATTORNEY AND CLIENT — MERCHANTABLE TITLE — LIABILITY FOR FAILURE TO OBTAIN LOAN.

   Where defendants failed to furnish a merchantable title to attorneys employed by them to secure a loan, they were excused from making or obtaining the loan, and, therefore, could not be held for any damages to defendants arising out of the failure to obtain the loan.

6. TRIAL—SUBMITTING NEGOTIATIONS TO JURY AS ONE TRANSACTION.

   Where preliminary negotiations by another so dovetailed with the subsequent personal negotiations of the defend-

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ants as to make the same part of the whole transaction, the court was right in permitting the same to go to the jury.

Error to Marquette; Flannigan (Richard C.), J. Submitted February 7, 1922. (Docket No. 184.) Decided March 31, 1922.

Assumpsit by Frank H. McCulloch and another against John O. VonZellen and another for services rendered. Judgment for plaintiffs. Defendants bring error. Affirmed.

B. H. T. Burritt, for appellants.

E. A. MacDonald, for appellees.

WIEST, J. The plaintiffs are attorneys at law with offices in the city of Chicago, and they brought this suit to recover attorney fees they claimed to be due for legal services rendered defendants and for cash disbursements made by them in connection with such services. Defendants denied such employment, and claimed the plaintiffs agreed to make them a loan of $100,000, secured by mortgage on all their property, for which the plaintiffs were to receive a bonus of $10,000 and 7 per cent. interest, that the plaintiffs agreed to pay all of the expenses in connection with the appraisal of defendants' property and abstracting and perfecting the title where necessary, and the plaintiffs did have the property appraised and made an effort to perfect the titles and paid out $838. The plaintiffs denied such an agreement and claimed they were engaged as attorneys to negotiate a loan of $100,000 and made diligent efforts in that behalf, but, being unable to perfect the title to all of defendants' lands, they were unable to obtain a loan. Defendants gave notice with their plea that plaintiffs had certain abstracts of title, title deeds and other personal property

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belonging to defendants of the value of $2,000, which they refused to return, and claimed damages by way of set-off. Defendants also gave notice of recoupment, claiming that plaintiffs agreed to loan them $100,000, and relying thereon they incurred great expenses and entered into agreements which they could not carry out for want of such loan, to their damage $10,000.

Defendants also, in their notice attached to their plea, charged plaintiffs with engaging in a conspiracy to financially ruin them, by attempting to induce them to enter into lumber contracts with irresponsible parties and to obtain a mortgage on their property for $2,000.

It is urged there was error in permitting Mr. McCulloch to testify to the number of days spent by himself and his office force in and about the employment, inasmuch as he said such matters were more or less of record in his office. The records were not produced and the point is made that such records were the best evidence and parol evidence was incompetent. If the matters were within the personal knowledge of Mr. McCulloch then there was no occasion to produce the books of account. The court committed no error in denying the motion to strike out such testimony of Mr. McCulloch.

There was no reversible error in striking out from the testimony of Olga VonZellen what she was told. If, as claimed now, her testimony related to something Mr. McCulloch had told her, such should have been made clear at the time. The record indicates some confusion upon the subject.

Mr. McCulloch testified he wrote a letter to defendant John O. VonZellen on the 25th day of November, 1916, and notice was served upon defendants to produce the original, and Mr. VonZellen testified he had made a search for the letter but was unable to find it

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and did not remember having seen it. Whether this letter was written by Mr. McCulloch and received by the defendant John O. VonZellen were questions for the jury. The letter written by Iver VonZellen to plaintiff Frank H. McCulloch depended for its admissibility upon the authority of the writer. It appears that the writer acted as an agent in the employ of the defendants and had charge of the office and the works. We think the letter was competent.

It is claimed the trial court erred in not submitting to the jury the question of defendants' damages claimed to have been sustained as the result of plaintiffs' failure to make the loan of $100,000. The court charged the jury, in effect, that it was necessary for the defendants to show a merchantable title to all of their property and in case of their failure so to do, the plaintiffs would not be liable for damages sustained by defendants as a result of the plaintiffs' failure or refusal to carry out their agreement and make or obtain the loan.

We have examined the record, and are of the opinion that, whether the loan was to be made by the plaintiffs, or they were acting to secure such a loan from others on their recommendation, they were justified, on account of the condition of the title, in refusing, and the question was not to be determined by the fact the defendants had title to enough of such property to secure such a loan. The trial judge was right in taking from the jury the question of damages claimed to have been sustained by the defendants on account of the failure of the plaintiffs to make or obtain the loan. The defendants failed to furnish plaintiffs with a merchantable title, and this excused the plaintiffs from making or obtaining the loan, and being so excused they could not be held for any damages arising out of the failure of the defendants to obtain the loan.

The preliminary negotiations by Miss Winifred

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VonZellen so dovetailed with the subsequent personal negotiations of the defendants as to make the same a part of the whole transaction, and the court was right in permitting the same to go to the jury. The abstracts and deeds turned over by the defendants to the plaintiffs did not, under the circumstances disclosed, furnish any grounds for damages by way of set-off.

An examination of the record discloses no reversible error, and the judgment is affirmed, with costs to the plaintiffs.

FELLOWS, C. J., and CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

VANEK *v.* SOUMAR.

1. EXCHANGE OF PROPERTY — FRAUD — PARTY DEFRAUDED MAY AFFIRM AND ASK FOR CANCELLATION OF MORTGAGE GIVEN.

   Where plaintiffs, after an exchange of properties, discovered that they had been defrauded, they had a right to affirm the contract and to call defendants to account for the fraud, and to have a mortgage given by plaintiffs to defendants canceled if the damages sustained reached the amount of the mortgage.

2. SAME — DEFRAUDED PARTY ENTITLED TO RELIEF SOUGHT — NOT COMPELLED TO RESCIND.

   Where the trial judge found defendants guilty of the fraud charged, he was in error in compelling plaintiffs to amend their bill to rescind the contract against their

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desire, especially where defendants asked no affirmative relief, and the property received by them had passed through several hands, had been neglected, and could not be returned in the condition it was at the time of the exchange.

3. SAME—FRAUD—MORTGAGES—PARTICIPANT IN FRAUD COULD NOT BE INNOCENT PURCHASER OF FRUIT THEREOF.

Defendant broker, who made fraudulent representations in negotiating the exchange, could not become an innocent purchaser of the mortgage given by plaintiffs on the property received by them.

4. SAME—DAMAGES—EVIDENCE—SUFFICIENCY.

Evidence *held*, sufficient to establish that plaintiffs' damages equaled the amount of the mortgage sought by them to be canceled.

Cross-appeals from Ottawa; Cross (Orien S.), J. Submitted January 10, 1922. (Docket No. 73.) Decided March 31, 1922.

Bill by Frank Vanek and another against John Soumar and another for the cancellation of a mortgage given upon an exchange of certain real properties. From the decree rendered, all parties appeal. Reversed, and decree entered for plaintiffs.

Charles E. Misner, for plaintiffs.

Lillie & Lillie, for defendants.

WIEST, J. Plaintiffs owned a flat building in the city of Chicago, and, feeling the urge of "back to the soil," desired to exchange the property for a farm. Defendant John Soumar owned an 89-acre farm in Ottawa county, this State, and had it listed with defendant Frank J. Grill, a real estate agent in Chicago, to sell or exchange. Through negotiations conducted by Mr. Grill, and after he had examined plaintiffs' property and plaintiffs, accompanied by Mr. Grill, had visited and examined the Ottawa county farm, an exchange was made August 1, 1918. Plaintiffs received the

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farm and gave Mr. Soumar a $2,000 mortgage thereon, and defendant Soumar received the Chicago property subject to a $4,000 mortgage thereon. Defendant Soumar, on August 14, 1918, conveyed the Chicago property to Frank Adamek, who sold it on February 28, 1920, to Elsie Krecek, who sold it to Alex Matzkanin. Plaintiffs took possession of the farm August 1, 1918, and discovered that Mr. Grill's representations in regard to the value of the farm and the fertility and character of the soil and the crops it would grow and the income it would provide, were all false in fact. The plaintiffs found the farm was mostly blow sand and irreclaimable swamp and "then the eyes of them both were opened," and they knew they had been defrauded.

Plaintiffs affirmed the exchange and filed the bill herein to have a cancellation of the $2,000 mortgage given to defendant Soumar, claiming that in equity and good conscience it should be done in satisfaction of the misrepresentations made and the fraud accomplished thereby, and also asked for additional damages. Defendants Soumar and Grill denied the fraud alleged and asked for the dismissal of the bill. The defendant Rolnicze does not appear to have been concerned in the fraud, and was dropped in the consideration of the case, and in speaking of defendants in this opinion we refer to Soumar and Grill.

At the hearing the trial judge found defendants Soumar and Grill guilty of the fraud charged, and by interlocutory decree ordered:

"That the defendants, within thirty days from this date, reconvey to the plaintiffs the property in Chicago, received in exchange for the farm mentioned in the bill of complaint, and the plaintiffs thereupon reconvey said farm and the personal property received in the exchange, to the defendant, John Soumar; that in such case, an accounting may be had as to any payments, improvements, profits or losses because of the

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reconveyances, and that the deed of the Chicago property be deposited with the county clerk of Ottawa county, Michigan, to be delivered to the plaintiffs upon their depositing a deed of the farm and a bill of sale of the personal property to said John Soumar with said county clerk.

"It is further ordered, adjudged and decreed that in default of the defendants making such reconveyance and depositing the deed with the county clerk to be delivered to plaintiffs, as aforesaid, then that the mortgage of two thousand (2,000) dollars, given by the plaintiffs upon said farm, will be canceled and held for naught, and the said plaintiffs will hold said farm free and clear of said incumbrance."

Another decree was entered based upon a finding that defendants had failed to deliver the deed. This decree set aside, vacated and declared null and void the $2,000 mortgage, and directed defendants to deliver up the mortgage.

The mortgage on the farm was assigned by defendant Soumar to defendant Grill on August 14, 1918, and the decree set aside, vacated and declared such assignment void as against the plaintiffs and directed defendant Grill to deliver up the assignment. This mortgage included $200 loaned by Mr. Grill to plaintiffs.

Later the court made another decree ordering that:

"Plaintiffs be permitted to amend their bill of complaint so as to conform to the theory of rescission and submit proofs covering their damages as to such rescission. * * * The defendants may answer such amendment. * * * That the plaintiffs file the deed and bill of sale specified in the original findings, within thirty days from the date of this interlocutory decree, and in default of the plaintiffs filing the deed and bill of sale with the clerk of this court within said thirty days, that the bill of complaint in this cause be dismissed, and the deed deposited by Frank J. Grill will be returned to him. * * * That both of said deeds will be subject to the incumbrances on the property at the time of the exchange of the properties, and

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the deed and bill of sale to be delivered by plaintiffs shall convey the property to Frank J. Grill. All conveyances to be held by the county clerk until the final decree herein."

March 28, 1921, another decree was entered finding defendants guilty of the fraud alleged in the bill, and decreed reconveyance by defendants to plaintiffs of the Chicago property and a conveyance of the farm and personal property by plaintiffs to defendant Soumar, and directed an accounting as to payments, improvements, profits or losses. The decree also provided for the cancellation of the $2,000 mortgage on the farm if defendants made default in depositing the deed to the Chicago property. The decree also provided that plaintiffs deed the farm to defendant Grill within 30 days and allowed plaintiffs certain items for the rental value of the Chicago building and improvements made upon the farm, and deducted therefrom the rental value of the farm and the interest due and found there was due from defendants to plaintiffs the sum of $720.50.

Plaintiffs amended their bill so as to ask for rescission but did so under protest by incorporating in the amendment the following:

"These plaintiffs, saving and reserving to themselves and without waiving the objections that the bill of complaint filed in this cause, was on the theory of affirmance of the contract, and the prayer of the said bill being in conformity to these averments and not wishing to rescind the said contract, but still desire to affirm and receive damages in accordance with such affirmance and in no manner wishing to be prejudiced by the filing of this amendment done in conformity with the interlocutory decree filed in this cause, and for that purpose only make the following amendment to said bill of complaint."

Plaintiffs and defendants appeal. The plaintiffs insist they have a right to be granted relief in accord-

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ance with their affirmance of the exchange. Defendants insist the bill should have been dismissed.

An examination of the record fully persuades us that the fraud complained of was practiced upon the plaintiffs through the false representations of defendant Grill. That being true, plaintiffs had a right upon discovery of such fraud to affirm the contract and to call the defendants to account for the fraud practiced upon them, and have the mortgage given by plaintiffs upon the farm canceled if their damages sustained reached the amount of the mortgage.

May the trial court, in a case where the plaintiffs claim and establish the fact that they have been defrauded by defendants in an exchange of property, and have affirmed the contract and elected to keep the property received in the exchange, and where the defendants ask no affirmative relief, compel the plaintiffs to rescind against their desire to do so? When the court found defendants guilty of the fraud charged, they were cast thereby to respond for the wrong they had committed. The court having found the fraud practiced upon plaintiffs in the exchange, the plaintiffs were thereby clearly entitled to have relief in accordance with their election to affirm the contract of exchange. There may be instances where, in order to do justice between the parties, the court may direct a return to the former status, even though the party complaining affirms, but this is not such a case. Plaintiffs had a clear right to retain the farm. The Chicago property had passed through several hands, had been neglected and could not be returned in the condition it was at the time of the exchange, and was no longer owned by Mr. Soumar. Defendant Grill, being the party who made the fraudulent representations, could not become an innocent purchaser of the mortgage growing out of the very fraud he practiced. It is difficult to reach a conclu-

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sion as to the exact loss occasioned plaintiffs by the fraud practiced upon them. It is clear, however, that the financial injury equals the amount of the mortgage upon the farm. Plaintiffs had a right, notwithstanding the fraud, to affirm the contract and ask that the mortgage, the fruit of such fraud, be canceled. *Smith* v. *Werkheiser,* 152 Mich. 177 (15 L. R. A. [N. S.] 1092, 125 Am. St. Rep. 406).

In a case where the plaintiffs have been defrauded and an obligation, a part of the fruit of the fraud, is in the hands of the one practicing the fraud, and the plaintiffs affirm the contract, and seek relief from the fraud practiced, by way of having such obligation canceled in satisfaction of the wrong done, and the defendants ask that the bill be dismissed, but do not ask for rescission or any affirmative relief, the court should grant relief in accordance with the rule of law governing in cases of affirmance of contracts voidable for fraud.

We have considered the value of plaintiffs' equity in the Chicago property, and the value of the farm and personal property thereon, at the time of the exchange, and we are of the opinion that the court below was right in entering the decree discharging the mortgage. The subsequent decrees in the court below changing the relief granted plaintiffs are reversed, and a decree will be entered in this court directing the defendant Grill to discharge the $2,000 mortgage upon the farm and surrender to plaintiffs the mortgage note within 20 days, and upon his failure to do so the decree of this court to operate as such discharge and the same may be recorded. Plaintiffs will recover their costs against the defendants Soumar and Grill.

FELLOWS, C. J., and CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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PEOPLE v. GENTHER.

1. CRIMINAL LAW — ROBBERY WHILE ARMED — ALIBI — TRIAL—INSTRUCTIONS.

   In a prosecution for robbery while armed, where defendant claimed he was not at the place of the robbery when the crime was committed, it was not reversible error for the court to fail to give instructions relative to such defense, in the absence of any request therefor, since it is within the common intelligence of jurors, without being told, that, if accused was at another place at the time of the robbery, he was not the robber.

2. SAME—TRIAL—INSTRUCTIONS.

   The charge of the court, *held*, to fairly present to the jury the question of defendant's participation in the robbery.

3. SAME — ROBBERY — NEW TRIAL — EVIDENCE — GREAT WEIGHT OF EVIDENCE.

   Where the robbery took place in a store, in the evening with all the lights on, and defendant was identified, five hours later, by the victim of the robbery, as the robber who went through his pockets and took his money, it cannot be said that the verdict of guilty was against the great weight of the evidence.

4. SAME—NEW TRIAL—AFFIDAVITS—LOCAL PREJUDICE.

   Affidavits by two citizens in support of a motion for a new trial, stating deponents' belief that all of the citizens of a city of about a million inhabitants were prejudiced against persons accused of the crime of robbery while armed, and believed any person so accused to be guilty unless his innocence were established, and that any citizen acting upon the jury would not render a verdict in a fair and unbiased manner, *held*, too general to impeach the verdict of the jury.

Error to recorder's court of Detroit; Keidan (Harry B.), J. Submitted January 13, 1922. (Docket No. 158.) Decided March 31, 1922.

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Andrew Genther was convicted of robbery while armed, and sentenced to imprisonment for not less than 10 nor more than 20 years in the State prison at Jackson. Affirmed.

Entenza & Gramer, for appellant.

Merlin Wiley, Attorney General, *Paul W. Voorhies*, Prosecuting Attorney, and *John V. Brennan*, Assistant Prosecuting Attorney, for the people.

WIEST, J. Defendant was convicted of the crime of robbery while armed, with intent to kill or maim if resisted. At the trial defendant claimed he was not at the place of robbery, and it is contended that, in charging the jury, the trial judge failed to give instruction relative to such defense. Counsel for defendant presented no requests to charge. It is within the common intelligence of jurors, without being told, that if the accused was at another place at the time of the robbery, then, of course, he was not the robber.

We have examined the charge and find the question of defendant's participation in the robbery was fairly presented to the jury. It is claimed:

"The testimony offered by the defense was of such a nature and character that only a prejudiced and biased jury could have decided that the defendant was guilty of the crime charged. The verdict was contrary to the great weight of the evidence."

A reading of the testimony does not persuade us there is any support for the argumentative part of the assignment of error. The robbery took place in a store, in the evening, with all lights on, and defendant was identified, five hours later, by the victim of the robbery, as the robber who went through his pockets and took his money. We cannot hold that the verdict should be set aside as against the great weight of the evidence.

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After the verdict, counsel for defendant in a motion for a new trial presented two affidavits, in each of which it was stated:

"Deponent further says that it is his belief that all of the citizens of Detroit were prejudiced against any person accused of the crime of robbery while armed, and believed any person so accused to be guilty, unless his innocence were established, and entertain the same feelings of bias and prejudice as this deponent.

"Deponent further says that in his opinion any citizen of this State who might act upon the jury in a trial of any such cause could not render a verdict in a fair and unbiased manner."

Such a general charge, based upon the belief of two citizens, spreads out too thin in a city of about a million inhabitants, to reach or impeach the verdict of the jury.

We find no error, and the conviction is affirmed.

FELLOWS, C. J., and CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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APRIL TERM, 1922.

CITY COMMISSION OF THE CITY OF JACKSON *v.* VEDDER.

MUNICIPAL CORPORATIONS — BONDS — JACKSON CHARTER — AMENDMENT—ELECTIONS—AUTHORITY TO ISSUE BONDS.

That the electors of the city of Jackson, having a home-rule charter, voted to amend the charter in respect to issuing bonds for a specific purpose, and at the same election voted authority to the city commission to issue the specific bonds thereunder, would not render the bonds invalid, since it is the issuance of the bonds, and not the vote of the electorate authorizing same, which creates the liability against the municipality, and it is immaterial that, at the time the commission took the preliminary steps to submit the question to the people, authority to issue the bonds was lacking.

Certiorari to Jackson; Williams (Benjamin), J. Submitted April 20, 1922. (Calendar No. 30,268.) Decided April 26, 1922.

Mandamus by the city commission of the city of Jackson to compel Clifton H. Vedder, city clerk, to comply with the order of plaintiff relative to the issuance of certain bonds. From an order granting the writ, defendant brings certiorari. Affirmed.

Barkworth & Leslie, for appellant.

Leland S. Bisbee, City Attorney (*W. S. Cobb*, of counsel), for appellee.

FELLOWS, C. J. The city of Jackson operates under

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a "home rule" charter. It has the commission form of city government. Due to the late war, high prices and other conditions, it ran behind in its financial affairs and some $375,000 was transferred from funds derived from the sale of bonds to its general fund for current expenses; $75,000 in addition to its revenue was also needed for such expenses. The limit of taxation in the charter prevented the raising of this sum by taxation. By appropriate action the city commission on December 5, 1921, submitted to the electors an amendment to the bonding section of its charter. The election was called for January 5, 1922. At the same meeting of the commission by resolution there was submitted to the electors at the same election the question of issuing the bonds of the city in the sum of $450,000. At the election the two questions were submitted on separate ballots and both carried by more than a two to one vote. The charter of the city as amended reads as follows, the italicized words being the amendment:

"The city commission, subject to the limitations and in the manner in this charter provided, and upon the approving vote of three-fifths of the qualified electors of the city voting thereon at any general or special election, may also borrow money and issue general obligation bonds of the city therefor for any public municipal purpose; Provided, however, that the city shall never issue bonds of any kind for the running expenses of the city or for the maintenance, operation or ordinary repairs of public buildings, public utilities or other property of the city. *Provided, further, however, that the city, during the year 1922, may issue its negotiable general obligation bonds in an amount not to exceed four hundred fifty thousand dollars ($450,000) to restore the moneys to the several funds created by the issuance and sale of bonds and which have been diverted, and to meet the unpaid obligations of the city incurred for running expenses and other unpaid obligations of the city to January 1, 1922, any provision of this charter to the contrary*

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notwithstanding. The city commission may also issue special assessment bonds and special assessment general obligation bonds as hereinafter provided. The city commission, by an affirmative vote of four of its members, and without the approving vote of the electors, may authorize in any year an issue of bonds for the purpose of paying matured or maturing bonds of the city. The proceeds of any bond issue shall be paid into the city treasury and credited to the fund for which the bonds are issued, and shall not be used for any other purpose."

The issuance of the bonds is resisted on the ground, principally, that the two questions could not be submitted at the same election; it being the claim of defendant that until the charter was amended there was no authority in the commission to take any steps preliminary to the issuance of the bonds for the purpose indicated and that such preliminary steps were a nullity and the vote authorizing the issuance of the $450,000 of bonds conferred no authority on the commission to issue them. In other words, it is the claim of the defendant that the charter should have been first amended before the bonding proceedings were instituted. The trial judge in a well-considered opinion with which we are in accord sustained the validity of the bonds and the case comes here on certiorari.

It will be noted that at the election held on January 5, 1922, two questions were submitted: (1) Should the commission be authorized to issue bonds for the purpose indicated? (2) Should this specific block of bonds be issued for such purpose? Both questions carried by the requisite vote. By this action of the electorate the commission was given authority to issue bonds for the specified purpose and in the specified amount. The charter was amended by the electorate, and by the electorate the specific amount of bonds was authorized. Both were questions for the electors

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to determine and the fact that they were determined at the same time does not weaken the authority. While the case of *Kirby* v. *City of Monroe,* 214 Mich. 615, is not directly in point, by analogy it is applicable. We there held (quoting the syllabus):

"Since the limitation of bonded indebtedness fixed in the charter of the city of Monroe applies to the issuance of the bonds and not to the vote authorizing same, injunction will not issue to restrain the city commission from issuing bonds within the legal limits, although the electors by vote authorized an issue in excess thereof."

We there recognized the rule that the issuance of the bonds, not the vote of the electorate, created the liability, and that if the municipality at the time of the *issuance* of the bonds had authority to issue them they were valid to the extent of the authority. So here, when the plaintiff sought on behalf of the municipality to *issue* these bonds it had by the charter as amended authority to issue the bonds for the specified purpose, and by the vote of the electors authority to issue bonds in the sum of $450,000 for such purpose.

Thompson Houston Electric Co. v. *City of Newton,* 42 Fed. 723, presented a similar question to the one before us. The authority of the municipality was assailed because the two questions of erecting an electric light plant and the issuance of bonds were combined. The court sustained the validity of the proceedings.

In *Frost* v. *Central City,* 134 Ky. 434 (120 S. W. 367), the city had guaranteed certain bonds in the sum of $30,000, and the issue voted with this sum exceeded the bonding limit. Before the bonds voted were issued the $30,000 of bonds were paid. It was held that the city was then authorized to issue the bonds, recognizing the view that the

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authority at the time of the issuance of the bonds rather than at the time of the vote controlled.

Shearer v. *Bay County Supervisors*, 128 Mich. 552, relied upon by defendant, involved the validity of a statute attempting to validate certain proceedings concededly invalid. The court held that the proceedings fell within that class which could not be validated by a curative statute. It is not out of accord with the holding in *Kirby* v. *City of Monroe, supra.* The same may be said of *Marshall* v. *Silliman*, 61 Ill. 218.

Some consideration is given in the briefs to the charter provisions before the amendment was adopted and it is suggested that they are inconsistent. We need not decide this question. The bonds in question are authorized by the amendment which is in no degree ambiguous.

The judgment will be affirmed. As the question is a public one, no costs will be allowed.

WIEST, MCDONALD, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

HENRY *v.* SINCLAIR.

1. EASEMENTS—RIGHT OF WAY—RESERVATION—CONSTRUCTION.

A reservation of a perpetual easement or right of way in the driveways upon certain conveyed lots for the joint use and benefit of the property owners of certain adjoining lots, their heirs and assigns, "adjacent to" said

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conveyed lots, construed, and *held*, to apply to the driveways along the border of the lots extending across them from one street to another, but not to apply to the driveway west of defendant's house, with consequent interference with or loss of the use of the porte-cochere thereon.

2. SAME—INJUNCTION.
Plaintiff was not entitled to a decree restraining defendants from such use of said driveways as did not interfere with plaintiff's easement therein.

3. NUISANCE — CONTEMPLATED NUISANCE — PREMATURE SUIT—DISMISSAL WITHOUT PREJUDICE.
Where a proposed filling station was not yet erected, and the state of the proofs was such that it was not ascertainable therefrom whether such structure, when erected, would become a nuisance, the decree of the court below properly left such question open to further litigation should it be deemed necessary hereafter.

Appeal from Genesee; Black (Edward D.), J. Submitted October 11, 1921. (Docket No. 84.) Decided June 5, 1922.

Bill by Fred A. Henry against George M. Sinclair and another to enjoin the obstruction of certain driveways. From a decree for plaintiff, defendants appeal. Modified and affirmed.

Withey & Freeman, for plaintiff.

George W. Cook, for defendants.

CLARK, J. Fred A. Henry and wife owned lots 335, 336, 337, 338, 339 and 340, city of Flint, shown on the appended map, but the record title to the west 39 feet of lot 340 was in the name of Mrs. Henry. By a separation agreement Mr. Henry agreed to convey to Mrs. Henry lots 338 and 339, reserving to himself and his grantees, owners of lots 335, 336 and 337, a perpetual easement, a right of way in certain

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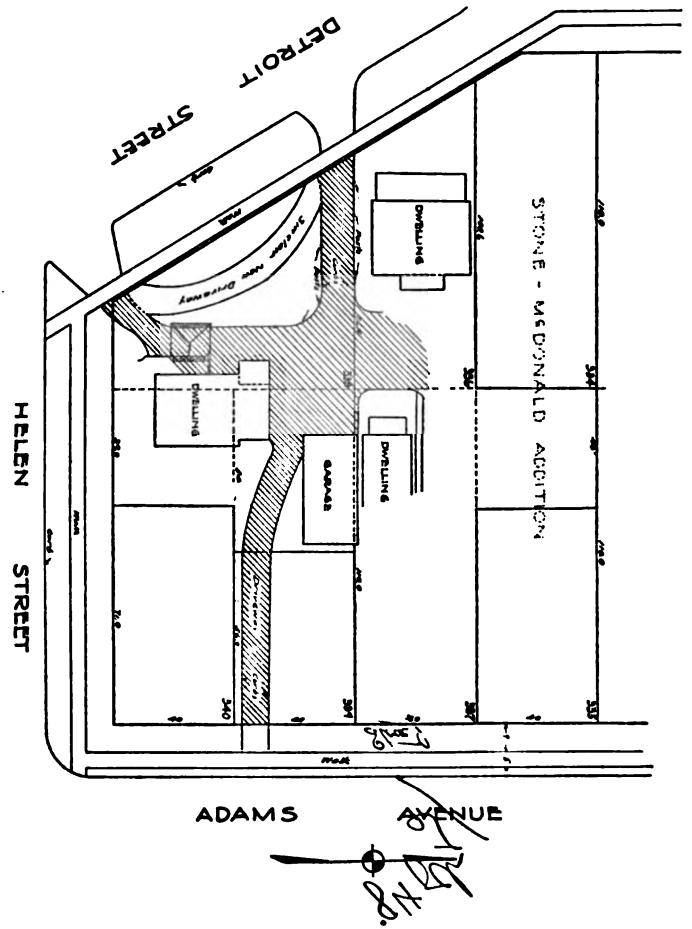

driveways, the language of paragraph five thereof being:

"It is mutually understood and agreed that the conveyance of the property mentioned in section one shall be subject to a perpetual easement or right of way in the driveways upon said property, for the joint use and benefit of the property owners of lots 335, 336 and 337 above referred to, their heirs and assigns, ad-

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jacent to lots 338, 339 and 340. And second party, her heirs and assigns, agrees not to obstruct said driveways."

This was followed by a deed to Mrs. Henry of lots 338 and 339 and the west 39 feet of lot 340, from which we quote:

"Subject to a perpetual easement or right of way in the driveways on said premises for the use and benefit of the owners of lots three hundred thirty-five (335), three hundred thirty-six (336), and three hundred thirty-seven (337) of said Stone-McDonald Addition (their heirs and assigns) adjacent to the premises hereby conveyed."

Mrs. Henry then conveyed to defendants lot 338, the west 54 feet of lot 339 and the west 39 feet of lot 340, the deed reciting:

"Subject to a perpetual easement or right of way in the driveways on said premises for the use and benefit of the owners of lots 335, 336 and 337 of said Stone-McDonald addition, their heirs and assigns, adjacent to the premises hereby sold and conveyed."

The shaded portion of the map indicates the location of the driveways upon the property. Plaintiff Henry owns lots 336 and 337. Defendants' dwelling is upon parts of three lots, as indicated, their garage is upon lot 339, and a porte-cochere extends over the driveway just west of their dwelling, and the principal question in the case is whether plaintiff, his grantees or others upon lots 335, 336 and 337 have a right under the agreement and the deeds to use such driveway. The right of plaintiff and others to use the other driveways extending from Detroit street to Adams avenue across lots 338 and 339 is not questioned.

Preparing to install a gasoline filling station on their property, defendants constructed what appears on the map as "Sinclair New Driveway" both ends of which cross the outer ends of the other driveways

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near Detroit street. It is said that defendants have no right to subject the other driveways to such use. Defendants obstructed the driveway west of their dwelling and denied plaintiff's right to use the same. A claim that the installing of a filling station was in violation of building restrictions and that it would constitute a nuisance was not pressed at the trial. The relief sought was that defendants be enjoined from obstructing any of such driveways except the new driveway as against the claimed rights of plaintiff and from using such driveways or any part thereof in connection with such filling station. Plaintiff was decreed the relief prayed. Defendants have appealed and present the following questions:

"(1) That the construction given by the trial court in its decree to paragraph five of the property settlement made between Fred A. Henry and Clara A. Henry (Exhibit A) is erroneous and should not be confirmed by this court.

"(2) That the decree of the trial court should be modified so as to exclude plaintiff from having an easement in the circular driveway extending from the intersection of Helen and Detroit streets under the portico of the Henry residence northerly until it intersects with the driveway extending from Detroit street to Adams avenue.

"(3) That the decree should be modified to permit the use of the driveway contemplated by the defendants so far as such use does not interfere with plaintiff's easement therein.

"(4) That the decree of the lower court should be modified so as to preclude the plaintiff from bringing any action to have defendants' proposed filling station declared a nuisance."

1 and 2. We agree with defendants. The language "adjacent to lots 338, 339 and 340," "adjacent to the premises hereby conveyed," must not be ignored. Adjacent means bordering on, near, or contiguous. It relates to driveways, none of which are within the exact meaning. But given a fair and probable mean-

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ing it relates to the driveways along the border of the lots, extending across them from Detroit street to Adams avenue. It is improbable that a right of way in the driveway west of defendants' house, with consequent interference with or loss of the use of the porte-cochere, was intended. And treating the language as ambiguous, as did the trial court, a consideration of all the evidence and of the writings themselves leads to the conclusion that there was no reservation of a right of way under the porte-cochere and in the driveway west of defendants' dwelling.

3. Plaintiff was not entitled to the relief decreed for it was not made to appear that the use to which defendants purposed to subject the westerly end of the driveway would materially impair or unreasonably interfere with its use as a way by plaintiff.

The rule is stated in 19 C. J. p. 978:

"Thus an owner whose land is burdened with a right of way has all the rights and benefits of the soil consistent with the reasonable use of the way, and may use the land over which the way passes in any manner which does not materially impair or unreasonably interfere with its use as a way."

4. The portion of the decree here sought to be modified is:

"It appearing to the court that the erection of the proposed filling station referred to in the pleadings in said cause has not proceeded far enough so that the cost of said structure nor its effect in regard to becoming a nuisance is ascertainable, and no proofs having been offered by either side on those subjects, the question of the effect of the erection and use of said structure (if it is hereafter erected) is not passed upon nor the rights of the parties in regard to those matters in any way considered, so that the plaintiff, his heirs and assigns, are not to be concluded in regard to those matters by this decree, but the right to litigate those questions, should it be deemed necessary hereafter, is left unimpaired."

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This is in accord with the holding in *Wolfschlager* v. *Applebaum*, 213 Mich. 180.

The decree so modified is affirmed, with costs of both courts to defendants.

FELLOWS, C. J., and WIEST, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

WORKERS' EDUCATIONAL ASSOCIATION *v.* RENNER.

1. CORPORATIONS—REQUIREMENTS AS TO OFFICERS AND MEMBERS—STATUTORY REGULATIONS.

In the absence of statutory regulation, a corporation organized not for pecuniary profit may make any reasonable regulation respecting the qualifications of its officers and members.

2. SAME—RESTRICTIONS CONTRARY TO STATUTE VOID.

Where the only restrictions respecting the qualifications of officers and members of corporations organized not for profit under Act No. 171, Pub. Acts 1903 (2 Comp. Laws 1915, § 9054 *et seq.*), permissible under section 2 of said act, were limited to requiring membership in good standing in any fraternal, religious, or beneficiary order, a provision in the by-laws of a corporation organized under said act restricting the membership of its board of directors and the active membership of its society to those who were members of the Socialist party, a political party, is void.

Appeal from Wayne; Wiest (Howard), J., presiding. Submitted October 5, 1921. (Docket No. 4.) Decided June 5, 1922.

For authorities passing on the question of charter restrictions on eligibility to become a shareholder in a corporation, see note in 46 L. R. A. 618.

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Bill by the Workers' Educational Association against Albert Renner and others for an injunction. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Lazarus S. Davidow (*Seymour Stedman*, of counsel), for plaintiff.

James H. Pound, for defendants.

CLARK, J. Plaintiff was organized in April, 1918, under Act No. 171, Pub. Acts 1903 (2 Comp. Laws 1915, § 9054 *et seq.*), relating to the incorporation of associations not for pecuniary profit. The part of the act here important:

"SECTION 2. The certificate may also contain any desired provisions prescribing the qualifications of officers and members whereby they may be required to be members in good standing of any fraternal, religious or beneficiary order or society, which provisions shall be binding upon the members and officers." * * *

Plaintiff's articles provided:

"The purpose or purposes for which it is formed are as follows: To promote the social, intellectual and economic welfare of its members, and all workers; to provide for their educational enhancement by means of lectures, entertainments, and other similar functions; to maintain a library, and to provide a hall for the carrying on of such objects. * * * The qualifications required of the officers and members are as follows: All trustees and officers must have been admitted to membership in this corporation, as provided in the by-laws thereof, and must have been good standing members of the Socialist party of America for three years, and good standing members of the Socialist party, local, Wayne county, Michigan, for six months."

And the following from the by-laws:

"There shall be two classes of members in this cor-

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poration: Active members, and associate members. Any person shall be eligible to active membership who, at the time of his admission, shall have been a member of the Socialist party of America for one year, and a member of the Socialist party of Wayne county for six months immediately preceding such application. Any person shall be eligible to associate membership in this corporation. Associate members shall have all the rights and privileges accorded to active members, except that they shall have no vote in the affairs of this corporation. An active member who shall cease to be a member in good standing of the Socialist party of America, or of the Socialist party of Wayne county shall automatically lose his membership in this corporation, and shall become an associate member.

"The management of this corporation shall be vested in a board of directors of fifteen members who shall serve for a period of two years, or until their successors shall have qualified. Only those shall be eligible for membership on the board of directors who shall be, at the time of their nomination, active members of this corporation, and who shall have been at the time of their election, members of the Socialist party of America for a period of at least three years immediately preceding their election.

"The board of directors shall elect from its own members the officers of this corporation, who shall be a president, a vice-president, a secretary, and a treasurer, and who shall serve during the pleasure of the board of directors."

The Socialist party of Michigan, in a State convention, made a declaration of principles which, in May, 1919, resulted in the expulsion of all Michigan Socialists from the Socialist party of America. Automatically thereby all members of plaintiff lost their standing as active members and the right to hold office therein, if the articles and by-laws above quoted were valid.

The corporation continued to function as before. Its members in the main joined other political parties, principally the Proletarian. Some, a mere handful of the membership, were reinstated in the Socialist

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party and they met, named certain of their number as officers of the plaintiff, denied that the then acting directors and officers of the corporation and the acting members, none of whom were affiliated with the Socialist party, had any right whatever to control and manage the affairs of the corporation, and demanded of them possession of the real estate of plaintiff, a building known as the House of the Masses, and of the records, equipment, funds and other property of plaintiff. They were refused and then launched this suit, claiming that they alone were the qualified officers and members of plaintiff; that defendants, the acting officers and directors and members, were not in fact such, but were all disqualified, seeking to enjoin defendants from paying out any of the funds of plaintiff, from interfering with the regular and lawful conduct of plaintiff's affairs and the possession of its property, and from assuming to control and possess plaintiff's property and affairs, and praying that plaintiff's property be restored to it, and that they, the Socialist wing, be decreed to be its officers and members. After answer and hearing the bill was dismissed. Plaintiff has appealed.

Of the several questions suggested in the briefs and by a carefully prepared opinion of the trial judge, we consider one. The articles and by-laws restricting the membership of the board of directors and the active membership of the society to those who were members of the Socialist party are void. Had the statute said nothing respecting qualifications of officers and members, the corporation might have made any reasonable regulation upon the subject. But if the statute is to have any effect, it must be that of limiting and restricting the provisions prescribing the qualifications of officers and members to those named in the statute, namely, "members in good standing in any fraternal, religious or beneficiary order or so-

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ciety." The Socialist party is none of these. It is a political party. It says of itself:

"The Socialist party of the United States is the political expression of the interests of the workers in this country, and is a part of the international working class movement."

Having chosen a restriction contrary to the statute under which the corporation was organized, the result is as though no restriction had been made. So the contention that the Socialists alone are qualified members, and hence that the persons named by them alone are the officers of plaintiff, cannot be sustained. See 3 Am. & Eng. Enc. Law (2d Ed.), p. 1078; 1 Bacon Ben. Soc. (3d Ed.) p. 162; 18 L. R. A. 583; 46 L. R. A. 618; *Allnutt* v. *Subsidiary High Court, A. O. F.*, 62 Mich. 110.

Whether a charter or by-law may compel a member of a corporation, under penalty of expulsion, to give up the free exercise of his right of suffrage and political affiliation is a question we need not discuss. See 14 A. L. R. 1446.

As to the relief afforded defendants, the decree is affirmed.

FELLOWS, C. J., and BIRD, SHARPE, MOORE, and STEERE, JJ., concurred. WIEST, J., did not sit.

The late Justice STONE took no part in this decision.

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PERE MARQUETTE RAILWAY CO. v. MICHIGAN PUBLIC UTILITIES COMMISSION.

1. STATUTES—CONSTRUCTION—WORDS AND PHRASES.
   The meaning of a word employed in a statute must be determined from the context, and resort, if necessary, to the lexicon.

2. RAILROADS — EXPENSE OF MAINTAINING CROSSING FROGS — APPROVAL OF CROSSING BY PUBLIC UTILITIES COMMISSION—STATUTES.
   The power of approval of the "manner" in which the tracks of one railroad company cross the tracks of another, given the public utilities commission by 2 Comp. Laws 1915, § 8365, has reference to the way, method, or mode of installing or repairing the physical crossing, and has no reference to an apportionment of the future expense of maintaining said crossing.

3. SAME—CONSTRUCTION OF STATUTE — EXPENSE OF MAINTAINING CROSSING.
   Under 2 Comp. Laws 1915, § 8369, providing for apportioning the expense of maintaining crossings already in existence, where the tracks of one railroad company cross the tracks of another, but making no provision for maintaining crossings subsequently made, it must be taken that the legislature, either purposely or inadvertently, left the matter of expense of installing and maintaining them to rest upon the company for whose benefit the crossing is made, in accordance with the common law.

4. SAME — HIGHWAYS AND STREETS — EXPENSE OF MAINTAINING CROSSING FROGS.
   While the right to use a public street gives to a street railway company the right to cross a steam railroad company's tracks without compensation, such right does not operate as an occasion for casting upon the steam railroad company a part of the expense of installing or maintaining the necessary crossing frogs, but the whole expense should be borne by the street railway company.

5. SAME — CROSSING FROGS — POLICE POWER — POWER OF PUBLIC UTILITIES COMMISSION.
   Although the public utilities commission under the pro-

On right of railroad company to compensation for the crossing of its track where it intersects a street or highway by an electric road, see notes in 13 L. R. A. (N. S.) 916; L. R. A. 1915D, 843.

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visions of 2 Comp. Laws 1915, § 8152, has power to order the installation of a new crossing frog to take the place of a defective one, in the interest of public safety, it has no power to apportion the expense of same, or compel the company whose tracks are crossed to bear part of said expense.

FELLOWS, C. J., and MOORE, J., dissenting in part.

Appeal from Ingham; Carr (Leland W.), J. Submitted January 26, 1922. (Docket No. 36.) Decided June 5, 1922.

Bill by the Pere Marquette Railway Company against the Michigan Public Utilities Commission and the Detroit United Railway, to set aside an order respecting certain crossings. From a decree for defendants, plaintiff appeals. Reversed in part.

Parker, Shields & Seaton, for plaintiff.

Donnelly, Hally, Donnelly & Munro, for defendant railway.

Merlin Wiley, Attorney General, and *J. E. Converse*, Assistant Attorney General, for defendant commission.

WIEST, J. This suit involves the power of the Michigan public utilities commission to order a steam railroad company to bear one-half the expense of renewing and maintaining crossing frogs where its line is crossed in a public street by the lines of a street railway company. The steam railroad track was constructed across the street, at grade, in 1895, and soon thereafter the street railway company at its own expense, and without any public sanction, installed in the street a physical crossing of the steam railroad track and has since maintained the same. The crossing frogs needing renewal, upon application of the defendant street railway company the commission assumed to have authority in the premises and ordered the

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crossing frogs to be renewed and maintained at the expense of both companies. Thereupon the bill herein was filed to set aside such order. The circuit judge found the commission had power in the premises and refused to set the order aside and by decree added to the order the command:

"That the said Pere Marquette Railway Company and the said Detroit United Railway shall immediately proceed to make, or cause to be made the necessary repairs to said crossings."

The suit is in this court on the appeal of plaintiff.

It is stipulated by the attorneys:

"That the only questions at issue in this case concern the actual physical crossing of the tracks of the Detroit United Railway and the Pere Marquette Railway Company, the repair and maintenance of the same as between the two companies, and the validity of the order of the Michigan public utilities commission with reference thereto, dated August 6, 1920. The maintenance of such crossing protection as watchman, gates or derailing system is not involved."

Counsel for plaintiff contend:

"That by the terms of section 3 of Act No. 171 of the Public Acts of 1893, the Detroit United Railway is:

"(*a*) Either required to install and maintain the crossings at its sole expense; or

"(*b*) Said act nowhere authorizes the Michigan public utilities commission to determine who shall bear the cost either of the installation or maintenance of the crossing frogs as between the junior and the senior road at a crossing constructed *subsequent* to the passage of the act, or to apportion it between them, and the commission was without statutory authority to make the order complained of in this case; and

"(*c*) In the absence of statutory authority the junior road at the crossing, in this case the Detroit United Railway, is required by common law to install and maintain the crossings at its expense."

The decision must turn upon whether the statute

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confers upon the commission the power to apportion the expense of installing and maintaining new frogs at the crossings. If such power is not to be found in the statute then the order cannot be sustained for the power is not inherent in the commission and in the absence of a statute authorizing an apportionment of the expense the duty of installing and maintaining the physical crossing falls upon the street railway company, as we shall later point out.

Counsel for defendant street railway company, and the attorney general, in behalf of the defendant commission, claim that Act No. 171, Pub. Acts 1893 (2 Comp. Laws 1915, §§ 8365-8371), confers such authority, and call attention to sections one and three of that act.

Section 1 provides:

"It shall hereafter be unlawful for any railroad company to construct its tracks across the tracks of any street railroad or for any street railroad company, whether operated by horses, cable, electricity or other motive power, to construct its tracks across the tracks of any railroad company or across the tracks of any other street railroad company until the place where and the manner in which such crossing shall be made shall have been approved by the commissioner (now public utilities commission) of railroads."

Section 3 provides:

"Such crossings shall, in all cases where the commissioner of railroads deems it reasonably practicable, be made otherwise than at grade; and in accordance with plans to be approved by said commissioner; and when made at grade said commissioner shall prescribe the safeguards which shall be provided by the company desiring to make such crossing, to prevent accidents thereat."

Section 5 provides:

"The commissioner of railroads shall, as soon as possible after the passage of this act, examine the

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crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat, as in his judgment ought to be so made or provided; and shall apportion any expense thereto between the companies affected as he may deem just and reasonable."

This last section in express terms applies only to crossings existing at the time of the enactment of the law in 1893. It does show, however, that the legislature had in mind the rule of law imposing the expense of physical crossings and their maintenance upon street railway companies where their tracks cross the line of an existing steam railroad in the public streets, and a recognition of the necessity of giving the commissioner express authority to apportion the expense of such changes as he might order in existing crossings.

This brings us to the consideration of section one of the act and to the language, "and the manner in which such crossings shall be made."

The attorney general says in his brief:

"It is true that said Act No. 171, Pub. Acts 1893, is the only act which directly authorizes any control by the defendant commission over the physical crossing of street railway lines and steam lines, but it will be our claim that this act is broad enough in its terms and should be construed to give the commission the authority claimed for it."

He contends that the words "and in the manner in which such crossing shall be made," should not be limited to mean the form, way or mode of crossing, but should be construed, under the provisions and purposes of the act, to include as well an apportionment of the expense thereof. The meaning of a word employed in a statute must be determined from the context and resort, if necessary, to the lexicon.

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The Century Dictionary defines the word "manner" to mean:

"The way in which an action is performed; the method of doing anything; mode of proceeding in any case or situation; mode; way; method."

It is clear from the context that the word "manner" as employed in the statute has reference to the way, method or mode of installing or repairing a physical crossing. But this does not reach to an apportionment of the expense contrary to common law. We must conclude from a consideration of all the provisions of the act, that the legislature, either purposely or inadvertently, left the matter of expense of installing and maintaining all subsequent crossings to rest upon the company for whose benefit the crossing is made and in accordance with the common law.

The learned circuit judge was of the opinion that section 44 of Act No. 300, Pub. Acts 1909 (2 Comp. Laws 1915, § 8152), has a significant bearing upon the question involved.

That act provides:

"The police powers of the State over railroads, street railways, interurban railways and suburban street railways, whether operated by steam, electricity or other motive power, organized or doing business in this State, shall be and the same are hereby vested in the railroad commission, and it is hereby made the duty of said railroad commission to exercise the same in accordance with the requirements of the law."

The circuit judge reached the conclusion that the defendant commission, as the successor of the railroad commission, has plenary authority to require the plaintiff company to cause to be repaired and placed in proper condition any part of its track, or track structure, that is defective, and also to compel the use of proper methods of protection at all crossings, including crossings with street railway and interurban lines.

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It may be conceded that under the police power and for the protection of the traveling public the commission is vested with power to order both companies to repair the crossing and to keep the same in repair, but this does not at all touch the question here. If both companies are directed to make the necessary repairs and the street railway company does not make them and the steam railroad company does, then under the law the steam railroad company may sue the street railway company and recover the cost. Under the order of the commission such right of recovery is cut off and that is the reason the question is here.

The order apportioning the expense reverses the well-established common-law rule, deprives plaintiff of the right, if it makes the repairs, to sue defendant company and recover the expense thereof, and places a burden upon plaintiff justified by no statute and contrary to its common-law rights. When plaintiff crossed the public street with its railroad track it assumed the duty to keep the crossing so made by it in reasonably safe condition and repair, with reference both to its own purposes and for ordinary travel upon the highway. 3 Elliott on Railroads (3d Ed.), § 1580.

This duty was not enlarged by reason of the street railway crossing its track, so as to cast upon the steam railroad company any part of the expense of installing or keeping in repair the crossing frogs for the convenience of the street railway company.

"Where one railroad crosses the track of another, it is ordinarily the duty of the crossing company at whose instance and for whose benefit the crossing is made to defray the entire expense of its construction in the first instance, and subsequently to keep the crossing in repair, unless the crossing is above or below grade. * * * Each company, however, owes a duty to the public as a common carrier to see that a grade crossing is kept in good repair and either may and should make such repairs as are necessary; but

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the company making them may recover from the other company if as between the companies it was the duty of the latter to do so, either by reason of its being the company for whose benefit the crossing was made, or its agreement to do so, or it may recover the proportion due from the other company where such expense is imposed by statute upon the companies jointly." 33 Cyc. pp. 250, 251; citing to the first part of the text *Toledo, etc., R. Co.* v. *Detroit, etc., R. Co.*, 62 Mich. 564 (4 Am. St. Rep. 875).

But it is claimed safety appliances made necessary for the protection of the public in the use of the street may be ordered and the expense thereof apportioned between the companies. *Detroit, etc., Ry.* v. *Commissioner of Railroads*, 127 Mich 219 (62 L. R. A. 149). The authority of the commissioner of railroads in that case was based upon section 5 of the act of 1893, above referred to, and in the opinion it is stated the crossing existed at the time of the enactment of the law. In the case at bar the stipulation as to the issues eliminates crossing protection such as watchman, gates and derailing devices.

The right to use the public street gave defendant company the right to cross plaintiff's railroad with its tracks, without compensation, but such right could not then, or later, operate as an occasion for casting upon plaintiff a part of the expense of installing or maintaining the necessary crossing frogs.

The rule is well stated in 25 R. C. L. p. 1170:

"Where a street railway has the right to cross a commercial railroad without compensation to the railroad the street railway must construct the crossing at its own expense; and it is obliged to put in the safest and best crossing in common use at the time. As the continuance of the crossing is as much for the benefit of the street railway as was its construction in the first instance, the cost of maintenance must be borne wholly by the street railway company; but it is the duty of the steam railroad company to supply the safety gates, or similar appliances, if necessary."

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This being the law, in the absence of a statute to the contrary, it will not do to say the commission, under the police power, may nullify such rule of law at will. The police power may be invoked to make the crossing safe but this in no sense involves the power to apportion the expense; the power to safeguard the public is ample without invading plaintiff's rights.

In *Central Passenger R. Co.* v. *Philadelphia, etc., R. Co.*, 95 Md. 428 (52 Atl. 752), all the questions here involved, except the construction of our statute, were raised and considered upon facts practically on all fours with the case at bar. The case is so well reasoned and supported by authority that we adopt the following:

"The common law doctrine that whatever structures are necessary for the crossing of an old way by a new way must be erected and maintained at the expense of the party under whose authority and direction the crossing is made is applicable to railways and railroads which intersect each other upon the public streets of a city, unless that doctrine be modified by statute. Outside of statutory provisions—and there are none such in this State—there is neither precedent nor authority for requiring the owner of the subsisting way to contribute any part of the expense rendered necessary to enable the owner of the new way to cross the old way. The crossing of the old way is made for the benefit of the second comer, and not for the benefit of the owner of the old way; and even though both occupants claim under licenses from the same municipality, common justice dictates that the one for whose exclusive benefit the crossing is made should defray the expense of constructing it. And as the continuance of the crossing is as much for his benefit as was the construction of it in the first instance, it is equally obvious that he should maintain it wholly at his own cost. That is all the decree appealed against determined, and that is all the steam railroad insists on."

And the same rule exists in Canada. 5 Can. Ry.

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Cases, 175. See, also, *West Jersey & Seashore R. Co.* v. *Atlantic City & Suburban Traction Co.*, 65 N. J. Eq. 613, 623 (56 Atl. 890); *Chicago & Calumet Terminal Co.* v. *Whiting, etc., R. Co.*, 139 Ind. 297 (38 N. E. 604, 26 L. R. A. 337, 47 Am. St. Rep. 264).

It must be held that the commission had no power to apportion the expense of installing and maintaining the crossing frogs.

The decree entered in the circuit court and the order of the Michigan public utilities commission, so far as the same require the plaintiff to bear a part of the expense of installing and maintaining crossing frogs at the crossing in question, are reversed and vacated, with costs to plaintiff against the defendant Detroit United Railway.

The order, as one requiring new crossing frogs to be installed, will stand affirmed.

CLARK, BIRD, SHARPE, and STEERE, JJ., concurred with WIEST, J.

FELLOWS, C. J. (*dissenting*). I am in accord with the opinion prepared by Mr. Justice MOORE in the case of *Michigan Air Line Railway* v. *Michigan Public Utilities Commission, post*, 320, involving the crossing at Pontiac, in which case the same questions are involved as are here involved. I am, therefore, compelled to dissent from the opinion prepared by Mr. Justice WIEST in the instant case. Notwithstanding some of the language used in *Toledo, etc., R. Co.* v. *Detroit, etc., R. Co.*, 62 Mich. 564 (4 Am. St. Rep. 875), I think *Detroit, etc., Ry.* v. *Commissioner of Railroads*, 127 Mich. 219 (62 L. R. A. 149), affirmed by the United States Supreme Court in *Detroit, etc., Ry.* v. *Osborn*, 189 U. S. 383 (23 Sup. Ct. 540), settles the constitutional questions raised in these cases, settles the extent of the police power of the State and clearly recognizes the right of the State in

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the exercise of that power to make the order complained of. Mr. Justice MOORE, who wrote for the majority of the court in that case, there reviewed the authorities and, in my judgment, there laid down the rules of law which must govern this case. During the course of the opinion, it was said:

"When the joint use of a crossing is obtained, is the position tenable that, because one road is older than another, the junior road must not only compensate the senior road for its present damage before it can cross, but for all time it must bear any additional future cost which may be made necessary by the erection and maintenance of appliances for the safety of the public, resulting from the increased use of the crossing? We think it logically follows from what has already been said that this question must be answered in the negative.

"It is said:

"'It cannot be pretended that without the existence of the steam-railroad crossing the railroad commissioner would have any jurisdiction, or that there would be any danger arising from the operation of the street railway which would call for an interference of the railroad commissioner. His jurisdiction only attaches because of the danger arising from the construction and operation of the steam railroad crossing the highway at the point in question.'

"It is a complete reply to this suggestion to say that, if there was no highway at this point traveled by a line of electric-railway cars and by the public, there would be no occasion for the interference of the railroad commissioner. It is because both of these conditions exist that human life is endangered at this crossing, and, under the exercise of the police power in the interest of public safety, the State is authorized to interfere through its agent, the railroad commissioner. * * *

"New dangers upon the public streets require new safeguards in the interest of the safety of the public. It is a matter of common knowledge that, where electric cars run at frequent intervals across a railroad over which trains are frequently run, it is a place of unusual danger, not only to the passengers in

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the steam cars, but also to the passengers in the electric cars. This danger is occasioned, not by the steam road alone, nor by the electric road alone, but by both of them. We have no doubt that, under such circumstances, the State, in the exercise of its police power, can take such steps as will minimize the danger, and can impose the expense of doing so upon the corporations causing the danger."

I think it should not be overlooked that the act creating the Michigan Railroad Commission (Act No. 300, Pub. Acts 1909 [2 Comp. Laws 1915, § 8109 *et seq.*]), to whose power the present commission succeeded, evidenced a legislative intent to clothe the commission with broad powers. Section 44 (§ 8152) of the act provides:

"The police powers of the State over railroads, street railways, interurban railways and suburban street railways, whether operated by steam, electricity or other motive power, organized or doing business in this State, shall be and the same are hereby vested in the railroad commission, and it is hereby made the duty of said railroad commission to exercise the same in accordance with the requirements of the law."

To my mind section 36 of the act (§ 8144) quoted by my Brother MOORE in the *Pontiac Case* unquestionably gives to the commission the power to make the order in question. The order made was in the interest of the public safety. This crossing was put in over 25 years ago. It was so out of repair that trains could only pass across it at the rate of 6 miles an hour. The welfare of the public required its repair. In my judgment it was within the power of the commission to order the work done and apportion the costs between the two companies now using this dangerous agency in the transportation of their passengers. I agree with the following language of the trial judge:

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"As the matter now stands the issue is not one between these two roads, but between the public and the appellant company. So viewed, I think it must be said that the defendant commission has the requisite authority to require the making of the necessary repairs and the charging of a portion of the cost thereof against the Pere Marquette Railway Company. The State, in the exercise of its police power, is entitled to deal with the situation that is found to exist. Repairs are admittedly necessary for the protection of traffic on both roads; and as between itself and the public appellant cannot avoid the obligation of seeing to it that its track structure is in proper and safe condition, and that its crossings are protected with sufficient safeguards."

It would seem from the record and the concessions of counsel in their briefs that the order should be modified. It appears that the Detroit United Railway by reason of its greater facilities to do the work, and the fact that it purchases crossing frogs in large quantities, would be able to do the work much more cheaply and expeditiously than could the Pere Marquette. I think the Detroit United Railway should do the work and the Pere Marquette should pay to the Detroit United Railway one-half the cost within 30 days from the completion of the work, the work to be commenced at once and to proceed with all reasonable speed. I think no costs should be allowed either party.

MOORE, J., concurred with FELLOWS, C. J.

The late Justice STONE took no part in this decision.

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MICHIGAN AIR LINE RAILWAY *v.* MICHIGAN PUBLIC UTILITIES COMMISSION.

RAILROADS—CROSSINGS—EXPENSE OF MAINTAINING CROSSING FROGS.

On certiorari to review an order of the public utilities commission approving the crossing of the tracks of certain steam railroad companies by the tracks of a street railway company and apportioning the expense of "the maintenance and renewals of the crossing frogs" share and share alike to the "companies whose tracks are crossed," the order approving the crossing is affirmed, but reversed as to the apportionment of the expense of renewals of crossing frogs, which, under the decision in *Pere Marquette R. Co.* v. *Michigan Public Utilities Commission, ante,* 307, should be wholly borne by the street railway company. FELLOWS, C. J., and MOORE, J., dissenting in part.

Certiorari to Michigan Public Utilities Commission. Submitted January 27, 1922. (Docket No. 11.) Decided June 5, 1922.

The Detroit United Railway filed a petition with the Michigan Public Utilities Commission for an order respecting certain crossings. From the order made, the Michigan Air Line Railway and the Detroit, Grand Haven & Milwaukee Railway Company bring certiorari. Reversed in part.

Geer & Martin, for appellants.

William L. Carpenter and *Samuel R. Williams* (*Stevenson, Carpenter & Butzel,* of counsel), for appellee.

MOORE, J. Counsel are agreed that the question in this matter is a single one of law, *i. e.,* whether the

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Michigan public utilities commission has statutory authority to apportion to and impose upon a railroad company which is the senior company, upon approving the crossing of its tracks by a street railway company, and prescribing safety devices to be installed at such crossing, more than the fair proportion of the expense it would have cost the senior railroad company to have kept in repair the portion of the track affected by the crossing if it had not been made; in other words, whether a share, to be determined by the commission, of the expense of future maintenance, renewal and operation of such crossing, and the safety devices to be installed thereat, can be apportioned to the senior company by the commission, without regard to what it would have cost the senior company to keep in repair its tracks if the crossing had not been made.

Plaintiffs are Michigan railroad corporations, while the Detroit United Railway, the applicant for approval of the crossings in question, is a Michigan street railway corporation. Plaintiff Michigan Air Line Railway has five tracks, consisting of a main track and four side or yard tracks, which cross Sanford street, Pontiac, while plaintiff Detroit, Grand Haven & Milwaukee Railway Company has one main track which crosses South Boulevard, Pontiac, these tracks having been in existence and use for a long time. In 1920, the Detroit United Railway, desiring to make a crossing of these tracks with its street railroad, made application to defendant for approval of such crossing; a hearing was had and under date July 21, 1920, defendant made its order approving the crossings, which order provided that the Detroit United Railway should bear the entire expense of making the crossings, and of installing the safety devices prescribed thereat, in the first instance, but that

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"The cost and expense of the maintenance and renewals of said crossing frogs, together with the cost and expense of the maintenance, renewal and operation of said inter-locking systems, to be borne, share and share alike, by the companies whose tracks are crossed."

Plaintiffs at the hearing contended that no share of the expense of future maintenance of these crossings, or safety devices, could legally be apportioned to them, they being the senior companies, but that the entire expense of future maintenance should be borne by the Detroit United Railway, the junior company. The commission, in making its order, overruled plaintiffs' contention in this regard, for the reason it considered it has statutory authority to make the apportionment it did.

The statutory provisions calling for attention here are sections 8367 and 8144, 2 Comp. Laws 1915.

Section 8367 reads:

"Such crossings shall, in all cases where the commissioner of railroads (commission) deems it reasonably practicable, be made otherwise than at grade; and in accordance with plans to be approved by said commissioner (commission); and when made at grade said commissioner (commission) shall prescribe the safeguards which shall be provided by the company desiring to make such crossing, to prevent accidents thereat."

This section was enacted in 1893.

Section 8144 reads:

"Authority is hereby given to the said commission, and it shall be its duty, if it shall deem it advisable, to prescribe the use of such modern generally approved system of protection for the safe operation of trains or cars at all crossings and junctions of railroads in this State, and at all crossings of draw bridges, upon which trains or cars are operated by steam, electricity or other power, such as will secure safety in the operation of trains or cars at such crossings, junctions and draw bridges, and to apportion the cost of construc-

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tion, operation and maintenance of such system of protection among the several companies in such proportion as to the commission shall seem just. The commission, having determined such form of protection, shall immediately cause a description thereof over its official signature to be delivered to an officer of the railroad affected thereby, with notice that the same must be adopted and put into practical force within a reasonable time to be fixed by the commission."

This section became a law in 1909. The public utilities commission by the order made endeavored, and we think did, give effect to both the sections quoted. It required the junior road to pay all the initial expense of the crossing. It then apportioned the expense of maintenance and renewals share and share alike between them.

While we have never had a case before this court that came on all fours with the instant case, we think the principles involved were before this court in *Detroit, etc., Ry.* v. *Commissioner of Railroads*, 127 Mich. 219 (62 L. R. A. 149). That case was taken to the United States Supreme Court, 189 U. S. 383 (23 Sup. Ct. 540), where it was affirmed. The case is so accessible we shall content ourselves with simply referring to it and saying it sustains the commission in the order made. See 3 Elliott on Railroads (3d Ed.), §§ 1480, 1582, 1586, 1609.

The order should be affirmed.

FELLOWS, C. J., concurred with MOORE, J.

We concur except that we think the question as to crossing frogs is controlled by *Pere Marquette R. Co.* v. *Michigan Public Utilities Commission, ante*, 307, decided of this date. WIEST, CLARK, BIRD. SHARPE, and STEERE, JJ.

The late Justice STONE took no part in this decision.

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FRITZ *v.* RUDY FURNACE CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—POWER OF INDUSTRIAL ACCIDENT BOARD TO ORDER ARBITRATION NOTWITHSTANDING UNAPPROVED SETTLEMENT.

   Where an injured employee wrote to the industrial accident board canceling the hearing on his claim and stating that he had settled with his employer and its insurer, but said settlement agreement was never submitted to, or approved by, the industrial accident board, the board had the right, if not the duty, to order arbitration of said claim regardless of said alleged settlement.

2. SAME—IRREGULARITY IN ARBITRATION PROCEEDINGS NOT INVOLVED IN FINAL HEARING.

   While the appearance of a deputy commissioner of the industrial accident board as attorney for plaintiff at the arbitration hearing was indefensible and highly improper, such irregularity is not involved in the final hearing before the full board which has no power to vacate the arbitration proceedings or to order another arbitration, but hears the case *de novo* and determines it upon the testimony already taken, and such additional testimony as the parties may submit.

3. SAME—POWER OF SUPREME COURT ON REVIEW.

   The power of the Supreme Court, on review of an award under the workmen's compensation act (2 Comp. Laws 1915, § 6465), is to review questions of law involved in the final determination of the board, and make such order in respect to such final determination as justice may require.

4. SAME—FINDING OF BOARD SUSTAINED BY EVIDENCE.

   Testimony that an employee, a laborer in a foundry, was injured in the side by the slipping of a bull ladle from which he was assisting to pour molten iron, and that an attack of appendicitis which immediately followed was probably caused thereby, *held*, sufficient to sustain an award of compensation therefor under the act, although

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Authorities discussing the question as to what is an accident within the meaning of workmen's compensation acts, in general, are collated in notes in L. R. A. 1916A, 29, 227; L. R. A. 1917D, 103; L. R. A. 1918F, 867.

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there was also testimony that the appendicitis was caused by an attack of influenza.

5. SAME—APPENDICITIS CAUSED BY INJURY ACCIDENTAL.
An attack of appendicitis caused by an accidental injury to the side is an accidental personal injury within the meaning of the workmen's compensation act.

6. SAME—EMPLOYEE'S PREDISPOSITION TO DISEASE AGGRAVATED BY INJURY IMMATERIAL—ACCIDENTAL INJURY.
That plaintiff's disability may have resulted from the accidental aggravation of a chronic ailment, and that he may have been predisposed because of disease to an attack such as befell him, *held*, immaterial in determining the question as to whether his injury was accidental.

Certiorari to Industrial Accident Board. Submitted January 25, 1922. (Docket No. 145.) Decided June 5, 1922.

Peter Fritz presented his claim for compensation against the Rudy Furnace Company for injuries received in defendant's employ. From an order awarding compensation, defendant and the State Accident Fund, insurer, bring certiorari. Affirmed.

Kerr & Lacy, for appellants.

CLARK, J. On January 29, 1920, plaintiff, a laborer in a foundry, was assisting in pouring molten iron from a bull ladle, which when filled weighed about 800 pounds. From opposite sides of the ladle a bar four or five feet in length projected, which at each end was divided into two handles between which a man stood when pouring, the ladle being supported by a bench. Plaintiff and a fellow workman had poured part of the metal,—

"*A.* When she slipped and gave me that wrench.
"*Q.* What slipped?
"*A.* Why, that bull ladle.
"*Q.* What did it slip in?

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"*A.* On the benches it was setting on. It got caught and I went to pull on it and it came back. She slipped and wrenched me. * * *

"*A.* I don't know where it slipped, but it slipped. When I was turning it, when I wanted to come back on it, it slipped.

"*Q.* It slipped as you were coming back?

"*A.* When she went down, when I took her down.

"*Q.* On which side?

"*A.* On the left side. Then when I started her back, she didn't come and I gave a strain on it and she slipped and she came back with force and just twisted me that way and I held on with one hand and pushed down with the other.

"*Q.* Which hand did you push down with?

"*A.* I pushed down with this hand. If I had let it go back it would have burned the other men; I held with this hand and pushed with the other; it wrenched me when it slipped. * * *

"*A.* When I came back and I went to pour on the right hand side and when I put my felt on the right hand side it hurt me and I said I am getting sick to my stomach. * * * In the meantime Burt took the ladle and I started away and that was the last I knew until I came to in the hospital."

Another witness said that plaintiff received a jerk—a hard jerk. Plaintiff testified that when he was so jerked or wrenched he felt a pain in the region of the appendix, and that he had suffered no similar pain before and he also claims some persistence of the pain in his side following the accident.

The employer called a physician whose opinion was that plaintiff had been overcome by the heat of the foundry room, and he was treated accordingly at the hospital where he remained nine days. The physician testified that while at the hospital plaintiff suffered a mild attack of influenza, but this plaintiff's testimony tends to deny.

On February 13, 1920, another physician found plaintiff suffering from appendicitis for which he was treated and later operated May 4, 1920. There was

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testimony that the appendicitis was chronic, there being hard and extensive adhesions, and that plaintiff might have been so afflicted at the time of the accident. Connecting the appendicitis with what befell plaintiff at the foundry, physicians testified:

"I would say with the accident he would be more apt to have it. Receiving an injury of that kind would lower resistance and would be a factor. * * *

"Yes, sir. I think it would be impossible in a case of the kind to eliminate the blow if he got a strain. * * *

"I am not speaking about this man particularly, this particular case, but cases in general. If a man received an injury such as a strain or blow on the side I think it would be a predisposing factor. * * *

"Just so far as is due to infection this accident may have been a factor in lowering the resistance so that this infection would become active. I can't say that the appendicitis was caused by the accident and I cannot say it was not. I think it was probably a predisposing cause. * * *

"*Q.* This man had chronic appendicitis?

"*A.* I would say so, yes, sir.

"*Q.* That might have extended over a period of years on January 29, 1920?

"*A.* It might have extended beyond that point, but in eliciting his history very carefully he repeatedly told me he had no trouble with the appendix previous to the injury.

"*Q.* And on that history you base your opinion that the injury caused the appendicitis?

"*A.* Considering his statement as we always consider the statement of a patient, it would be reasonable to conclude that was it."

There was medical testimony that appendicitis might be caused by influenza, but the board found, in effect, that plaintiff had not suffered an attack of influenza, as claimed.

There was report of an accident, and after notice and application for adjustment of claim, plaintiff sent the board the following letter:

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"Dowagiac, Mich.,
"June 8, 1920.

"Mr. FRED H. JOHNSON, Sec'y.,
"Industrial Accident Fund,
"Lansing, Michigan.

"*My dear Mr. Johnson:* I have this date sent you a telegram as follows:

'Cancel hearing on my claim against Rudy Furnace Company and State Accident Fund —they have settled—letter follows.'

"In explanation I want to advise that the writer does not consider himself able to attend the hearing on account of his own condition, and the State Accident Fund through the Rudy Furnace Company have settled the case in a manner satisfactory to me.

"I thank you for your courtesy in this matter and beg to remain,

"Yours very truly,
"PETER FRITZ."

It seems that the substance of the agreement between the parties was that the bills of the hospital and the physicians be paid, and it seems they were not paid. Approval by the board of such agreement was neither sought nor given.

Ignoring the letter, the board ordered arbitration, at which plaintiff appeared and said he did not want a hearing. The hearing was adjourned indefinitely by the deputy commissioner in charge. The board again ordered arbitration at which plaintiff appeared and testified in support of his claim for compensation. The arbitration committee consisted of a deputy commissioner and two other members. Defendant was represented by counsel. As counsel for plaintiff, deputy commissioner Derham appeared, who, when questioned as to his authority to appear, said: "I appear in behalf of the State of Michigan." Objection being made to his so appearing, he said:

"The respondent in this case and the State accident fund have by every possible means availed themselves of every technicality in this case. For that reason it

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has been necessary for the industrial accident board to send a representative to Dowagiac to see to it that this applicant's interest is looked after."

Defendant's motion to dismiss on the ground that the claim of plaintiff had been withdrawn was overruled. Plaintiff had award of $12.60 per week, and that the total of such weekly payments then due was $604.80, and for medical and hospital bills under the act, which award on review was affirmed by the board, it being found that what befell plaintiff at the foundry as stated was an accidental personal injury arising out of and in the course of his employment, and that the disability resulted from the injury. Defendants bring certiorari.

1. That it was the right, if not the duty, of the board to order arbitration regardless of the alleged agreement in settlement or waiver, or release of compensation, is settled by the opinion of this court in *Dettloff* v. *Hammond, Standish & Co.*, 195 Mich. 117.

2. The service by the deputy commissioner as an attorney for plaintiff at the arbitration is indefensible, beyond the scope of his statutory duties and powers, and is without right of compensation by the State. The duties of the board are *quasi*-judicial. The judicial mind opposes one's being both judge and advocate in a cause. Such practice brings an administration of the law into disfavor. But the board on review had no power to vacate the arbitration proceedings, to order another arbitration, or to grant a rehearing on arbitration. See *Jones* v. *St. Joseph Iron Works*, 212 Mich. 174, where it was said:

"When the arbitrators make their award either for or against the plaintiff, that award fixes the rights of the parties, and these rights are, in the absence of fraud, irrevocably fixed unless the board on review, hearing the case *de novo*, upon the testimony already taken, and such additional testimony as the parties may submit, reaches a different conclusion. In this

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way, and this way alone, may the award of the arbitrators be set aside."

The power of this court as expressed by the statute is to review questions of law involved in the final determination of the board and to make such orders in respect to such final determination as justice may require. Section 5465, 2 Comp. Laws 1915. The irregularity in the arbitration is not involved in the final determination of the board, and, therefore, cannot affect the result here.

3. The board in its findings disregards the testimony of the physician called by the employer as to plaintiff's being overcome by the heat and finds an accidental personal injury under the act, from the testimony of the plaintiff and his fellow workman in respect to the wrenching, twisting, and jerking suffered by plaintiff because of the slipping or catching of the ladle, and the pain then suffered by plaintiff in the region of the appendix, and the subsequent history of his ailment. The finding has evidential support and therefore is sustained.

That what befell plaintiff was an accidental personal injury under the act, see: 14 N. C. C. A. p. 527; *Schanning* v. *Standard Castings Co.*, 203 Mich. 612; *Robbins* v. *Original Gas Engine Co.*, 191 Mich. 122; *Grove* v. *Michigan Paper Co.*, 184 Mich. 449.

The finding by which influenza as a cause of the disability was eliminated may not be said to have no evidence to sustain it. Nor can we say that there is no evidence that the subsequent disability and the appendicitis are not attributable to the accident. To do so would ignore certain of the medical testimony upon which the board based its finding as to the disability. The medical testimony here is distinguishable from that reviewed in *Weidner* v. *Northway Motor & Manfg. Co.*, 205 Mich. 583, cited by counsel. And that plaintiff's disability may have resulted from the

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accidental aggravation of a chronic ailment and that he may have been predisposed because of disease to this form of attack have nothing to do with the question of whether what befell him is to be regarded as an accident. *La Veck* v. *Parke, Davis & Co.*, 190 Mich. 604; *St. Clair* v. *Meyer Music House*, 211 Mich. 285; 10 N. C. C. A. 756.

The award is affirmed.

FELLOWS, C. J., and WIEST, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

HULSWIT v. ESCANABA MANUFACTURING CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—LIABILITY OF MASTER WHERE SERVICES WHOLLY PERFORMED OUTSIDE OF STATE.

An employer who has voluntarily become subject to the provisions of the workmen's compensation act may not avoid liability thereunder for an employee's accidental death in a foreign State on the ground that the contract of employment contemplated that all of the services thereunder were to be performed in foreign States, since the relation of employer and employee under said act is contractual and the provisions of the act are to be read into the contract of employment, which is a Michigan contract enforceable by a Michigan tribunal, and the rights of the employee thereunder accompany him wherever he goes within the scope of his employment.

On constitutionality of provisions of workmen's compensation acts which are limited to residents of the State, see note in 12 A. L. R. 1207.

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2. SAME—VIOLATION OF MASTER'S INSTRUCTIONS — PROOF — SUFFICIENCY.

Defendant's claim that it was not liable because, at the time of the accident resulting in his death, deceased was violating its instructions by traveling in an automobile instead of by train, *held*, not supported by competent proof that such instructions were given.

Certiorari to Department of Labor and Industry. Submitted April 25, 1922. (Docket No. 107.) Decided June 5, 1922.

Esther C. Hulswit and others presented their claim against the Escanaba Manufacturing Company for the accidental death of their decedent in defendant's employ. From an order awarding compensation, defendant brings certiorari. Affirmed.

H. J. Rushton, for appellant.

Charles A. Watt (*William K. Clute,* of counsel), for appellees.

BIRD, J. Defendant is a manufacturer of wooden wares in the city of Escanaba. C. Fred Hulswit was employed by defendant in the fall of 1918 to sell its wares. A part of his territory lay in Michigan and a part in Indiana. In January, 1919, he made a new contract with defendant to go to the west coast and represent defendant in the States of California, Oregon, and Washington. In pursuance of this contract he went to those States and began his work. Upon at least a portion of his territory he used an automobile. While so traveling in November, 1920, he met with an accident in which he lost his life. Defendant being subject to the Michigan workmen's compensation law, plaintiff, his widow, and his two children by a former wife, made an application for a death award. After the usual proceedings the department of labor and industry granted plaintiffs'

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petition. Defendant has removed the proceedings to this court by writ of certiorari, and raises the question

"that the department of labor and industry has no jurisdiction, or authority, under the statute in force at the time of this accident, to award compensation to the dependents of the deceased employee, who did not perform any services in the State of Michigan, and whose contract of employment did not contemplate any services to be performed in this State."

1. While there is a slight difference in the facts of this case and those involved in *Crane* v. *Leonard, Crossette & Riley,* 214 Mich. 218, we think it must be controlled by the conclusions therein reached. In the case cited the work of the servant was partially performed in this State and partially in other States. In the case we are considering the services contracted for were entirely performed outside of the State. In *Crane* v. *Leonard, Crossette & Riley,* it was held that as our compensation act was voluntary the relation was one of contract, and that the provisions of the act must be read into the contract between the employer and employee. This being the ground upon which our conclusions were reached in that case it must follow that the relations of the parties in this case must rest upon contract. If they do, the act would cover a case where none of the services were performed within this State, as well as a case where they were partially performed within the State. It would hardly be consistent to hold that by reason of the contract relations the act would apply to services partially performed outside of the State, but would exclude cases where the services were entirely performed outside of the State. There are in the provisions of the act no limitations or restrictions which would oppose this view. The contracting parties were both residents of Michigan, and the contract which they made was a Michigan contract, and we see no

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reason why it should not be enforced by the Michigan tribunal.

The courts are not in unison on this question but the weight of authority is decidedly in favor of this view. The authorities are cited and the questions involved here are so thoroughly discussed in the opinion of Mr. Justice FELLOWS in the case of *Crane* v. *Leonard, Crossette & Riley* that it is unnecessary to repeat them here.

2. Another point made by counsel is that C. Fred Hulswit was violating his master's instructions while traveling in an automobile instead of by train. The board found that there was no competent proof showing that Hulswit was given such instructions. We are satisfied with this conclusion.

Our views are in accord with those reached by the department of labor and industry and its award will be affirmed, with costs to plaintiff.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, SHARPE, MOORE, and STEERE, JJ., concurred.

LETOURNEAU *v.* DAVIDSON.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—REVIEW OF AWARD—POWERS OF BOARD—QUESTIONS REVIEWABLE.

Under the workmen's compensation act (2 Comp. Laws 1915, § 5467), the industrial accident board, on the hearing of a petition to review an award theretofore made by it, may not review the facts establishing liability as found

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by it, but the amount of the weekly payment ordered, due to changed physical condition of the party injured, may be ended, diminished, or increased, subject to the maximum and minimum amounts provided in the act, if the facts proven warrant such action.

2. SAME—AWARD MAY NOT BE REDUCED ON ACCOUNT OF DISABILITY DUE TO OLD AGE.

On petition of the employer to review an award of compensation to an injured employee, who was 77 years old, the industrial accident board was not justified in reducing the amount of the weekly award one-half on the ground that the continuing disability was due about equally to the injury and to conditions incident to old age, since the act is applicable alike to all ages, and the amount to be awarded is in no way dependent upon the probability of a more speedy and complete recovery by a person young in years than by one of advanced age.

3. EVIDENCE—DISABILITY DUE TO OLD AGE—JUDICIAL NOTICE.

The court will take judicial notice of the fact that the earning power of a person performing manual labor is usually lessened when he reaches the age of 77 years.

Certiorari to Industrial Accident Board. Submitted April 4, 1922. (Docket No. 16.) Decided June 5, 1922.

Joseph Letourneau presented his claim for compensation against James Davidson for injuries received in defendant's employ. From an order reducing the payments under an award, plaintiff brings certiorari. Reversed, and order vacated.

Kinnane, Black & Leibrand, for appellant.

J. E. Converse, for appellee.

SHARPE, J. The plaintiff sustained an injury while in defendant's employ on November 28, 1916. Claim for compensation was made, resulting in an award of $8.25 per week, to continue during disability. This was affirmed by the board on July 13, 1918.

On November 10, 1919, defendant filed a petition,

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praying that payment be terminated for the following reasons:

"(1) The amount awarded by this board as a weekly payment to the applicant was contrary to the great weight of evidence in said cause.

"(2) That the amount awarded by this board as weekly payment to the applicant was not warranted by the average wages paid to the applicant by the respondent.

"(3) That the amount awarded by this board to the applicant as weekly payment was not warranted by the average annual earnings of the applicant prior to his injury.

"(4) That the amount awarded by this board as weekly payment to the applicant was not warranted by the facts and the record in said cause.

"(5) That the said applicant has fully recovered from and is not now suffering any disability as result of the injuries suffered by him and for which an award was made."

Testimony was submitted in support of the petition. The board found that the first four reasons assigned were *res adjudicata* and the fifth not supported by the proofs, and dismissed the petition.

On September 29, 1920, a petition quite similar in form was presented to the board. It was therein stated on information and belief—

"that the only disability now suffered by the applicant is that of old age, he being approximately seventy-seven years of age; that he is suffering from senility and that no part of his present condition can be traced to his injuries as a cause."

The reasons assigned are:

"(1) That the amount awarded by this board as weekly compensation to the applicant was not warranted by the average wage paid to the applicant by this respondent.

"(2) That the amount awarded by this board to the applicant as weekly compensation was not warranted by the average annual earnings of the applicant prior to his injury.

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"(3) That the applicant has fully recovered from the injuries suffered and sustained by him and that compensation therefor should be stopped.

"(4) That the respondent under the facts and circumstances in the premises should have an order entered by this board releasing him from the payment of any further compensation as a result of the alleged injuries.

"(5) That the said applicant has fully recovered from and is not now suffering any disability as a result of the injuries suffered by him and for which award was made, and for that reason compensation should be stopped."

Plaintiff answered, averring that the first four reasons should not be considered because the questions presented had become *res adjudicata*, and denied that the fifth was supported by the facts. The petition was considered by the board on December 7, 1920, no additional proofs having been submitted. On April 2, 1921, the board addressed a letter to the attorneys, saying:

"The board has decided to have Mr. Letourneau, the applicant in the above entitled case, examined by an impartial physician, and has selected Dr. Charles H. Baker, Crapo block, Bay City, Michigan, for that purpose. Dr. Baker, under date of March 31, 1921, advised us that he would be ready to make such examination at any time during the coming week, and we ask that you communicate with Dr. Baker and arrange a time convenient to all parties."

It does not appear that any of the attorneys were present when Dr. Baker examined the plaintiff. In his report to the board, after stating somewhat in detail the physical condition of the plaintiff, he said:

"Mentally he appears normal and his nerve reflexes are better than most men of his age. He is of a wiry enduring type which preserves its strength late in life and in my judgment his disabilities—which are very real—are only partly senile and partly the results of the injury he received. He is unable to perform

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manual labor and in my judgment the disability is about equally the result of injury and the natural loss due to his age."

A copy of this report was sent to the attorneys for both parties in a letter in which they were advised:

"The case will be held in abeyance for a period of one week from date to enable the parties to file any testimony they care to submit. An order will be entered at the expiration of that time according to the file."

To this, plaintiff's attorneys replied:

"I note also that the case will be held in abeyance for a period of one week from date to enable the parties to file any testimony they may care to submit and that an order will be entered at the expiration of that time according to the files. Now in answer thereto wish to say that we have no additional testimony to submit. Our position is covered by our briefs now on file with you in this case and we know of nothing to add at this time but what has already been said. We are of the opinion that the matters and questions raised by the respondent in this case are *res adjudicata* under the pleadings and proofs now before the board."

On May 9, 1921, the board made an order which we quote in part:

"Taking all the facts, circumstances and conditions surrounding the case as disclosed and set forth by the record in the same and the report of Dr. Baker filed with the board on April 7, 1921, it is ordered and adjudged, that the respondent pay to claimant in compliance with the order now in force the sum of $8.25 per week from the 24th day of September, 1920, to the 7th day of April, 1921 (the date of the receipt of the report of Dr. Baker), a period of twenty-seven (27) weeks, or a total of two hundred twenty-two and 75-100 dollars ($222.75), which should be paid forthwith and receipt therefor filed with the board; and that from April 7, 1921, the order now in force in this matter should be amended and modified to give compensation to claimant in the sum of $4.12½ per week; which sum represents the amount of disability due to the injury as shown by the report of Dr. Charles

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Baker, which has been accepted as evidence by both applicant and respondent, during the continuance of his partial disability, all in accordance with the terms and provisions of the workmen's compensation act."

This order the plaintiff reviews by certiorari.

The power of the board to review an award theretofore made by it is conferred by section 14 of part 3 of the act (2 Comp. Laws 1915, § 5467). In considering a petition for such a review, this court said in *Estate of Beckwith* v. *Spooner*, 183 Mich. 323, 329 (Ann. Cas. 1916E, 886):

"On the hearing of such petition for review it can be stated as a general rule that the essentials leading up to the award, or its equivalent, are to be taken as *res adjudicata*, except the physical condition of the injured employee, which naturally and legally remains open to inquiry."

We later held in *Pocs* v. *Buick Motor Co.*, 207 Mich. 591, *Diebel* v. *Construction Co.*, 207 Mich. 618, and *Jones* v. *St. Joseph Iron Works*, 212 Mich. 174, that a rehearing may not be had to review the facts establishing liability as found by the board. The amount of the weekly payment ordered, due to the changed physical condition of the party injured, may, however, "be ended, diminished or increased, subject to the maximum and minimum amounts" provided in the act, if the facts proven warrant such action.

Plaintiff's counsel insist that the report of Dr. Baker was not competent evidence. Defendant's counsel says that it was and urges that the correspondence indicates an assent on the part of plaintiff's counsel that it should be so considered. The relief sought in the petition was that "compensation should be stopped." On it and the report of the doctor, the board determined that the then disability of plaintiff was partially due to conditions incident to old age and reduced the amount of the award. If we give the report probative force, we do not think it justified the

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order made. The plaintiff was about 73 years of age at the time of his injury and about 77 at the time he was examined by Dr. Baker. We may take judicial notice that the earning power of a person performing manual labor is usually lessened when he reaches the age of 77 years. In Wisconsin, the act provides for a percentage reduction of compensation when the applicant reaches a certain age. *City of Milwaukee* v. *Ritzow,* 158 Wis. 376 (149 N. W. 480, 7 N. C. C. A. 498). The provisions of our statute by which the amount of compensation is to be determined are applicable to all ages. The amount to be awarded is in no way dependent upon the probability of a more speedy and complete recovery by a person young in years than by one of advanced age. It depends entirely upon the nature and extent of the disability and the wages earned. So long as the disability continues, the payments must continue, within the limits fixed by the act. Any attempt to determine that a part of the disability is due to an injury from which there has not been a recovery and a part to conditions incident to old age would be entering upon a field of speculation which we think neither the board nor this court should be at liberty to explore. As was said in *Winn* v. *Adjustable Table Co.,* 193 Mich. 127, 131:

"It is impossible to know how much the claimant might have earned if suffering only from the partial disability when, as a matter of fact, he cannot earn anything because of the total disability."

After further commenting on the difficulty presented, it was said:

"It was an attempt to meet a situation not provided for by the statute, and neither the industrial accident board nor this court has any power to do that."

A somewhat similar question was presented in *Hills* v. *Oval Wood Dish Co.,* 191 Mich. 411. In that case the defendants, after making payment for a consider-

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able time pursuant to an award, asked to be relieved for the reason that claimant's continued disability was due to a venereal disease from which he was suffering at the time of the injury and which retarded the healing of the wound caused thereby. In the opinion filed by the board it was said:

"The compensation law does not fix any standard of physical health, nor does it make any exceptions for cases of injuries to men whose health is impaired, or below the normal standard. Neither does it except from the benefits of the law the man who carries in his body a latent disease which, in case of injury, may retard or prevent recovery. The law by its expressed terms applies to every man who suffers disability from injury. It does not exclude the weak nor the less fortunate physically, but was intended for the working men of the State generally, taken as they are."

After quoting the above, Mr. Justice PERSON, speaking for the court, said:

"We agree with the industrial accident board that, under the circumstances of this case, the act does not contemplate any such apportionment of the period of disability as respondents ask for. Assuming that such disability is being prolonged by the disease, there is yet no point at which the consequences of the injury cease to operate. It is the theory of respondents, not that the consequences of the injury cease, but that they are prolonged and extended. There is no part of the period of disability that would have happened, or would have continued, except for the injury. The consequences of the injury extend through the entire period, and so long as the incapacity of the employee for work results from the injury, it comes within the statute, even when prolonged by pre-existing disease."

The order of the board reducing compensation is reversed and set aside. The plaintiff will recover costs.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

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CARVEY *v.* W. D. YOUNG & CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—ACCIDENTAL INJURY—WILFUL MISCONDUCT.

Where plaintiff, a watchman, in making his rounds, rode a bicycle, and, in passing between two piles of lumber, lost his balance, grasped the end of a board and fell, the injuries caused thereby, resulting in partial paralysis, were accidental within the meaning of the workmen's compensation act, in the absence of proof that plaintiff was guilty of wilful misconduct.

2. SAME—FINDING OF DEPARTMENT OF LABOR AND INDUSTRY CONCLUSIVE IF SUPPORTED BY EVIDENCE.

Although plaintiff had suffered from arterio sclerosis and high blood pressure for some time, and was subject to occasional attacks of dizziness, where there was testimony that on the day of the accident he was all right, the finding of the department of labor and industry that his injury was accidental rather than due to disease and natural infirmities must be sustained, since the department is the trier of the facts, and its finding, if it has evidential support, is conclusive.

3. SAME—EMPLOYEE'S PREDISPOSITION TO DISEASE IMMATERIAL.

That plaintiff was predisposed, because of disease, to the form of attack from which he suffered, has nothing to do with the question of whether what befell him on the occasion in question is to be regarded as an accident.

Certiorari to Department of Labor and Industry. Submitted May 4, 1922. (Docket No. 64.) Decided June 5, 1922.

Abram Carvey presented his claim against W. D. Young & Company for injuries received in defendant's employ. From an order awarding compensation, defendant and the Lumbermen's Mutual Casualty Company, insurer, bring certiorari. Affirmed.

On injuries arising out of and in the course of the employment within meaning of workmen's compensation acts, see notes in L. R. A. 1916A, 40, 229; L. R. A. 1917D, 114; L. R. A. 1918F, 896.

On what constitutes serious and wilful misconduct of employees within the meaning of workmen's compensation acts, see L. R. A. 1916A, 75, 243, 355; L. R. A. 1917D, 133.

On effect of fact that pre-existing disease contributed to injury or death on right to recover, see note in L. R. A. 1917D, 110, 129.

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Crane & Crane and *W. J. Nash,* for appellants.

F. P. McCormick, for appellee.

CLARK, J. Plaintiff in making his rounds as a watchman rode a bicycle. On November 6, 1920, while passing between some piles of lumber he lost balance momentarily and, in an effort to save himself, grasped the end of a board in one of the piles. The bicycle passed from under him. He fell and claims that he was thereby injured. He was 64 years of age and for some time had suffered from arterio sclerosis and high blood pressure. He had occasional attacks of dizziness. He, complaining principally of an injury of his shoulder and arm, completed his duties that day with difficulty and has not worked since. He became partially paralyzed. The department of labor and industry found an accidental personal injury arising out of and in the course of the employment, that the accident resulted in disability from November 6, 1920, to June 30, 1921, that the disability ended on the last mentioned date, and awarded compensation accordingly. Defendants bring certiorari and say:

1. That there was no accident, that:

"If plaintiff had run over some object in his path, or his bicycle had slipped on the floor or any one of many unusual things had occurred, we would not question that he had had an accident. But not so under the facts of this case. Whatever happened to plaintiff was through his own voluntary act. What he did was done deliberately and knowingly. There was absolutely nothing unusual in this man's falling from his bicycle. It was no unusual or fortuitous circumstance which the law requires."

The contention has no merit. It may be that plaintiff's fall from the bicycle was due to his inattention, carelessness or negligence. Perhaps in the emergency his attempt to prevent a fall by grasping the board was unwise. But there is neither claim nor proof

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that plaintiff was guilty of that wilful misconduct which would relieve defendants of liability for the consequences of an accidental personal injury arising out of and in the course of the employment. Section 5432, 2 Comp. Laws 1915.

2. That the accident was caused by, and the subsequent disability was due to, disease and natural infirmities of plaintiff. There is considerable testimony in the record sustaining this claim of the defendants. But the department is the trier of the facts. If the finding that the disability, cerebral hemorrhage with resulting paralysis, was attributable to an accidental personal injury under the act has evidential support it must be sustained.

Plaintiff testified:

"*Q.* Could it have been possible that you had a dizzy spell this time when you fell off?

"*A.* No, I don't think I was dizzy, I was all right that day, some days I was worse than others."

A physician testified:

"*Q.* Doctor, was there anything—he did give you some history of falling?

"*A.* That he had fallen off his wheel.

"*Q.* And injured his shoulder?

"*A.* And injured his shoulder.

"*Q.* Did the history as you received it at that time have any connection in your mind with the condition that you found there, a partial paralysis of the left side?

"*A.* No, at that time it did not.

"*Q.* Well, has it any time since or would it now?

"*A.* All I can say is that his fall might have been responsible for the subsequent development of the partial paralysis.

"*Q.* In what way, what connection would the shoulder have with the paralysis?

"*A.* In this way that paralysis in these cases is usually due to rupture of small vessels, the extent of the paralysis depending largely on the amount of hemorrhage as a rule.

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"*Q.* These hemorrhages are where?

"*A.* In the brain.

"*Q.* Then your theory or your belief, doctor, is that the jar itself would cause a slight hemorrhage in the brain and thus cause what is commonly known as a cerebral hemorrhage. Isn't it true that a cerebral hemorrhage might bring on a paralysis?

"*A.* Not always, as an example a man may fall on the street or suffer a fracture of the skull with hemorrhage and he may subsequently go to his home and become unconscious from the gradual accumulation of blood in the brain. That is, it depends, understand, upon the immediate extent of hemorrhage.

"*Q.* Do you believe that the condition that you found on the 9th was the result of a cerebral hemorrhage?

"*A.* Apparently of a slight hemorrhage.

"*Q.* And then the history of it all, in your estimation, it would probably produce a hemorrhage?

"*A.* It might, especially on account of the arterio sclerotic condition of the brain, it might, I wouldn't want to state definitely that it did.

"*Q.* But it would be a satisfactory explanation from the fact that the hemorrhage existed?

"*A.* His paralysis would, yes.

"*Q.* Isn't it true, doctor, that where an arterio sclerotic condition exists and where the hemorrhage occurs without any exertion whatever, like coming on in bed, that it is usually of a more serious nature?

"*A.* Yes, it usually is.

"*Q.* And that the paralysis caused where the cerebral hemorrhage is caused by some slight accident is of a lesser nature many times than what the other kind would be?

"*A.* Well, it might be.

"*Q.* Because some smaller vessel breaks instead of the larger artery?

"*A.* Yes."

And of plaintiff's condition on June 30, 1921, a physician testified:

"Well, his paralysis has partially cleared up. His speech defect is practically cleared up, he has a little trouble at times but he still apparently has a weakness of his left leg and arm."

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Even if, as claimed, these witnesses gave other testimony in conflict with that quoted, the weight of the testimony quoted was for the department to determine. *Meyers* v. *Railroad Co.*, 199 Mich. 134; *Parnell* v. *Pungs*, 190 Mich. 638.

If there were no evidence to meet the contention of defendants that plaintiff's fall was occasioned by disease, an attack of dizziness, the holding in *Van Gorder* v. *Packard Motor Car Co.*, 195 Mich. 588 (L. R. A. 1917E, 522), and like cases, might require a finding that the accidental personal injury did not arise out of and in the course of the employment. But plaintiff's testimony that he was "all right that day," not dizzy, makes this case clearly distinguishable.

Because of the testimony quoted, the history of the disability and the circumstance of cerebral hemorrhage and paralysis following the fall, we cannot say that the finding is without evidence to support it. See *Kirkley* v. *General Baking Co.*, 217 Mich. 307; *Paton* v. *Port Huron Engine & Thresher Co.*, 214 Mich. 130, and cases there cited. And the fact that plaintiff was predisposed because of disease to this form of attack has nothing to do with the question of whether what befell him is to be regarded as an accident. *St. Clair* v. *A. H. Meyer Music House*, 211 Mich. 285, and cases there cited.

The award is affirmed.

FELLOWS, C. J., and WIEST, MCDONALD, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

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ALLEN v. ROBERT GAGE COAL CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—CAUSE OF DEATH—CONJECTURE—EVIDENCE—SUFFICIENCY.

Where an employee in a mine was found dead by a fellow employee, and there was no mark upon the body and no evidence of any injury or of the cause of death, no autopsy having been held, the cause of death was conjectural, and a finding by the department of labor and industry that death was accidental within the meaning of the workmen's compensation act is lacking in evidential support and must be reversed.

2. SAME — PRINCIPAL AND AGENT — AGENT'S AUTHORITY TO ACT—ESTOPPEL.

A statement to plaintiff by a clerk at the mine, after consulting an assistant in the office of the general manager, that defendant would assume responsibility for the death and that an autopsy would be unnecessary, does not constitute an estoppel, in the absence of evidence of authority to make said statement or of its ratification by defendant.

Certiorari to Department of Labor and Industry. Submitted April 12, 1922. (Docket No. 56.) Decided June 5, 1922.

Olive Allen presented her claim for compensation against the Robert Gage Coal Company for the accidental death of her husband in the defendant's employ. From an order awarding compensation, defendant brings certiorari. Reversed, and order vacated.

Humphrey, Grant & Henry, for appellant.

Crane & Crane, for appellee.

CLARK, J. Defendant is a corporation engaged in mining and marketing coal. Its mines are at St. Charles and Bay City, and its principal office is at Bay

As to what constitutes an accident or personal injury within the meaning of workmen's compensation acts, see notes in L. R. A. 1916A, 29 and 227; L. R. A. 1917D, 103; L. R. A. 1918F, 867.

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City. Plaintiff's husband, Harvey Allen, was a coal miner of 20 years' experience, but immediately prior to the day in question he had worked 5 years in factories. On his first day in a mine of defendant at St. Charles he was employed as a driver's helper, Steele being the driver. From a room in which the coal was mined through an entry to the base of the shaft the coal was carried on a 36-inch track in two small cars drawn by a mule. In the track were a curve and a grade. The entry was uneven as to width and height. Crossing the top of the entry was an insulated electric cable. There was no electric light at the place in question. The men wore carbide lamps. The brakes to control the cars on the grade were known as sprags. Steele rode in front. Allen either walked or rode in the rear. Usually the helper rode the bumper of the rear car.

After proceeding about 100 feet along the entry, Steele stopped the mule, went back and had Allen remove a sprag. He returned to the front of the cars, drove slowly about 30 feet, stopped, either on the curve or just after passing it and after passing the cable, for the removal of more sprags, looked back, missed Allen's light, heard a moan, went back, and found Allen lying dead across the track, on his back, two or three feet behind the rear car.

From evidence of a careful examination of the body, the department of labor and industry found:

"No marks or evidences of bruise or external injury were found on the person of decedent after death."

It was not known whether Allen was riding or walking just before his death. Allen had always been in good health. But he complained that day of difficulty in breathing. There was evidence that that was commonly experienced on a first day of employment in the mine.

A physician gave in the death certificate the cause

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of death as internal injury. But in explanation he testified:

"Q. You can't say, can you, doctor, that that man died as the result of any fall, can you?

"A. I cannot any more than you might say it was not an injury. I cannot say any more than that either. I can say it was an injury, as far as that was concerned. It is only speculative. No man can tell just what the cause of death was, as far as that was concerned.

"Q. The cause of the death?

"A. If there had been a *post mortem* that then would have disposed of the whole problem.

"Q. As you said, you made a careful examination of the entire body of the man, as it lay stripped there before you, in the undertaking room?

"A. I did.

"Q. There was nothing whatever apparent from your examination there, from what you saw, or felt, or from what you did, to indicate that this man died as a result of a fall, or as a result of the accident, was there?

"A. No.

"Q. His death might have been caused by heart disease, might it not?

"A. Might possibly have.

"Q. You don't know?

"A. I don't know. I didn't make that explicit at all. When I signed that an 'internal injury,' I thought it was just as liable to be internal injury as anything else. * * *

"Q. Your testimony is that the cause of his death is entirely conjectural and speculative?

"A. Yes, it is to me.

"Q. You can't state whether he died as a result of the fall, or whether death resulted from natural causes?

"A. No, I can't. * * *

"Q. Based upon your observation and examination, there was nothing to warrant a statement that this man died an accidental death, was there, doctor?

"A. No. * * *

"Q. Having reference to other facts pointing to the

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death of this man you thought warranted in placing as the cause of death 'internal injury,' didn't you?

"*A.* They were speculative on my part, of course.

* * *

"*Q.* There was no evidence upon which to base 'internal injury'?

"*A.* No, I thought it was just as speculative one way or the other."

There was no autopsy. There was evidence that a clerk at the mine, after consulting an assistant in the office of the general manager at Bay City, had advised plaintiff that defendant would assume responsibility for the death and that an autopsy was not necessary, and that similar statements had been made by the superintendent of the mine.

The death occurred December 16, 1920. Plaintiff knew, January 29th following, that defendant would not pay compensation and on February 4th following defendant denied liability and that an accident had occurred. Plaintiff had the maximum award under the act. Defendant brings certiorari.

The department, after covering the case in some detail, summarizes as follows:

"Several witnesses who had years of experience as miners, and who were familiar with the part of the mine where the decedent was found dead, testified that there were several ways that decedent could very readily have met his death. They testified that he could have struck his head against the roof of the mine at the point where the roof was unusually low; that he could have been brushed against the roof of the mine or the side of the entry and knocked from the car; that he could have fallen or been thrown from the car when it rounded the sharp curve into the main entry, coming down the grade, as it was; or that he could have come in contact with the electric cable which the train had just passed.

"Taking into consideration the evidence as to the unusually good physical condition of the decedent, the fact that there is no evidence of any ailment which

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could be said to tend to cause death, and the unusual dangers of death from accident in the immediate locality in which he was found dead or in a dying condition, we find that the decedent's death was due to an accidental personal injury."

But the infirmity of the finding is that there is no evidence to sustain any of the theories advanced. And the department did not definitely fix upon any theory. Counsel urge that death may have been caused by contact with the electric cable, citing *Paton* v. *Port Huron Engine & Thresher Co.*, 214 Mich. 130. But in that case there was evidence of a defective cable, that shocks were received from it and of a burn caused by electricity upon the body of the deceased. There is no evidence of electrocution in the case at bar. *Meyers* v. *Railroad Co.*, 199 Mich. 134, is also cited. But there a fireman who had been working on a locomotive was found dead on a cement floor beside his engine and the autopsy disclosed concussion of the brain as the cause of death. Because of the absence here of any like or kindred showing of a cause of death, the cases are distinguishable, and this applies to *Shaw* v. *Packard Motor Car Co.*, 214 Mich. 660, also cited by counsel.

The finding of an accidental death under the act is without evidential support, rests upon mere conjecture, and therefore cannot be sustained. *Hubbard* v. *Republic Motor Truck Co.*, 216 Mich. 358; *McCoy* v. *Michigan Screw Co.*, 180 Mich. 454 (L. R. A. 1916A, 323); *Ginsberg* v. *Burroughs Adding Machine Co.*, 204 Mich. 130; *Chaudier* v. *Stearns & Culver Lumber Co.*, 206 Mich. 433 (5 A. L. R. 1673); *Draper* v. *Regents of University*, 195 Mich. 449; *Thier* v. *Widdifield*, 210 Mich. 355.

The record is barren of proof that the employee or employees of defendant who assumed to waive an autopsy, and to acknowledge for defendant responsibility for compensation under the act, had any author-

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ity so to do. The department does not find such authority. There is evidence that no such authority had been conferred. In the absence of authority the circumstance does not constitute an estoppel. There has been no ratification.

Language used in *Maxson* v. *Railroad Co.*, 117 Mich. 218, is applicable here:

"This was an unusual contract, and not such as individuals or corporations are in the habit of making. A division superintendent of a railroad is not a general agent who is, by virtue of his agency, authorized to perform every act, or make every contract, which his principal might do. To settle claims and make life contracts is not within the ordinary powers of such an agent. It was, therefore, incumbent upon the plaintiff to show either original authority to make the contract or ratification by the company."

And see *Nephew* v. *Railroad Co.*, 128 Mich. 599; *Hurley* v. *Watson*, 68 Mich. 531; *Randall* v. *Railway Co.*, 113 Mich. 115 (38 L. R. A. 666); 2 C. J. p. 947.

The rule seems harsh as applied to this case,—so unfortunate for the plaintiff.

But the award must be vacated.

FELLOWS, C. J., and WIEST, MCDONALD, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

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BUELL v. HINES.

1. MASTER AND SERVANT — RAILROADS — INTERSTATE COMMERCE — FEDERAL STATUTE—NEGLIGENCE—DEATH.

One employed to help coal and water locomotives used in interstate commerce is engaged in interstate commerce, and, therefore, an action for his negligent death may be maintained against the director general of railroads under the Federal statute (35 U. S. Stat, p. 65).

2. SAME—EXISTENCE OF RELATIONSHIP.

After deceased reached the railroad yards, and while traveling to the coal dock, where he was employed, in the usual way, the relation of master and servant existed.

3. SAME—MASTER NOT LIABLE FOR NEEDLESS RISK OF SERVANT.

Where a servant voluntarily and of his own motion exposes himself to risks outside of the scope of his regular employment, without or against the order of the master or vice-principal, and is injured thereby, the master is not liable.

4. SAME—ASSUMPTION OF RISK.

Where deceased, instead of traveling his usual safe route between the tracks, on his way from the yard to his work at the coal dock, stepped onto the foot board of a passing locomotive, thereby choosing an obviously dangerous position without the knowledge of the master, he assumed the attendant risk, and the master may not be held liable for his death as the result of a collision between the locomotive and a freight train.

Error to Genesee; Black (Edward D.), J. Submitted January 18, 1922. (Docket No. 99.) Decided June 5, 1922.

Case by Oliver Buell, administrator of the estate of Ernest Vun Cannon, deceased, against Walker D. Hines, director general of railroads, operating the Pere Marquette Railway Company, for the alleged

On constitutionality, application and effect of the Federal employers' liability act, see notes in 47 L. R. A. (N. S.) 38; 48 L. R. A. (N. S.) 987; L. R. A. 1915C, 47.

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negligent killing of plaintiff's intestate. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Parker & Wilber and *B. F. Reed*, for appellant.

Carton, Roberts & Stewart, for appellee.

BIRD, J. This suit, under the Federal act (35 U. S. Stat. chap. 149, p. 65), was prosecuted by plaintiff to recover damages against defendant for negligently causing the death of his intestate. The defendant had verdict by direction of the court. Defendant's coal dock is situate north of the city of Flint just outside the city limits. The deceased was employed at the dock helping to coal and water locomotives. He lived south and west of the coal dock. In going to his work he would go north to the Pierson road, east on the Pierson road to defendant's yards, and then north between the main and passing tracks to the coal dock. This was his usual way of going to and from his work. On the early morning of December 28, 1918, when he reached the tracks, he did not go north the usual way between the tracks, but he stepped onto the foot board of a locomotive intending to ride to the dock. This locomotive was coupled to others, one in front and one behind. They were going to the dock to be coaled. Just previous to this a freight train had been cut and the front part had pulled up to the north beyond the coal dock for some purpose. This was unknown to the locomotive hostler and he pulled into the gap with these three locomotives. He had not gone far when he collided with the head end of the freight which was moving back to get the rear end. The effect of this collision was to drive the tender of the front engine back on the pilot and foot board where the deceased was standing. In consequence of this

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the deceased suffered injuries from which he soon after died. The negligence complained of was the backing of the freight train without any lookout on the rear end of it. The morning in question was cold and foggy and objects were not easily seen.

1. It is contended by defendant that the action cannot be maintained because the deceased was not engaged in interstate commerce. It appears from the testimony that a large percentage of the freight which was carried through defendant's yard was interstate freight. That the deceased assisted in furnishing the locomotives with coal and water and it was further shown or understood that the Pere Marquette Railway was an interstate railway. The facts in the case of *Horton* v. *Navigation Co.*, 72 Wash. 503 (130 Pac. 897, 47 L. R. A. [N. S.] 8), were very similar to those in the present case. It was there held that the deceased was engaged in moving interstate traffic. In that case the very pertinent question was asked, what effect it would have had upon interstate commerce if no one had been employed to take the deceased's place in coaling and watering the locomotives. The same conclusions have been reached in other similar cases. *Erie R. Co.* v. *Collins*, 170 C. C. A. 240, 259 Fed. 172; *Erie R. Co.* v. *Szary*, 170 C. C. A. 246, 259 Fed. 178; *Guy* v. *Railroad Co.*, 198 Mich. 140.

2. We are likewise impressed that the relation of master and servant existed after the deceased reached the railway yards and while he was traveling north to the coal dock in the usual way between the tracks while he was going to and leaving his work. *Feneff* v. *Railroad*, 196 Mass. 575 (82 N. E. 705); *Erie R. Co.* v. *Winfield*, 244 U. S. 170 (37 Sup. Ct. 556, Ann. Cas. 1918B, 662); *Ewig* v. *Railway Co.*, 167 Wis. 597 (167 N. W. 442, 169 N. W. 429); *Ewald* v. *Railway Co.*, 70 Wis. 420 (36 N. W. 12, 591, 5 Am. St. Rep.

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178); *Boldt* v. *Railroad Co.*, 18 N. Y. 432; 1 Roberts Federal Liabilities of Carriers, p. 788.

It seems to us clear that while the deceased was using the 10-foot strip between the main and passing tracks to go and return from his work, the relation of master and servant existed, and had the deceased been injured while traveling this route, by reason of some hole or obstruction, which rendered the way unsafe, defendant would, undoubtedly, have been obliged to respond in damages, but that is not exactly the case we have to deal with. Instead of traveling the usual route after he reached the yards the deceased chose an obviously dangerous way to reach the docks, namely, between the two locomotives. He entered and occupied this dangerous place without the knowledge of his master, or any one of his co-servants. No other person knew until after the injury had taken place that the deceased was riding on the locomotive. As to this act we are persuaded that the defendant would owe him no greater duty to protect him from injury than it would any other licensee. When the deceased went outside the scope of his employment and assumed an obviously dangerous position without the knowledge of the master, he assumed the risks which were attendant thereon.

This rule is laid down, as follows:

"Where a servant voluntarily and of his own motion exposes himself to risks outside of the scope of his regular employment, without or against the order of the master or vice-principal, and is injured thereby, the master is not liable." 26 Cyc. p. 1224.

Ruling Case Law has this comment:

"In going to and from his place of work upon the premises owned or controlled by his employer, an employee is deemed, as a general rule, to be engaged in the employment, and the employer in providing him a safe way to pass and repass is bound to exercise the degree of care employed by the contract of service,

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though, of course, *if the employee chooses to go by an unusual and unsafe way the rule is otherwise.*" 18 R. C. L. p. 584.

This rule was applied in *Kennedy* v. *Chase,* 119 Cal. 637 (52 Pac. 33, 63 Am. St. Rep. 153). This case quotes Thompson on Negligence, as follows:

"'We have found no support for any rule,' says Mr. Thompson, in speaking of the rights of trespassers or mere licensees, 'which would protect those who go where they are not invited, but merely with express or tacit permission, from curiosity or motives of private convenience, in no way connected with the business or other relations with the occupant.' 1 Thompson on Negligence, p. 303."

The case of *Cleveland, etc., R. Co.* v. *Workman,* 66 Ohio St. 509 (64 N. E. 582, 90 Am. St. Rep. 602), is an interesting application of the rule.

This court has also applied the rule in *Kopf* v. *Monroe Stone Co.,* 133 Mich. 286.

We are unable to resist the conclusion that the trial court was right in directing a verdict for defendant on this ground. When the deceased left the usual way of going and coming from his work and boarded this locomotive, he was, while on it, no more than a licensee, and by reason thereof he assumed the risks attendant thereon.

The judgment is affirmed.

FELLOWS, C. J., and WIEST, CLARK, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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DUNWOODY *v.* ROYAL INDEMNITY CO.

1. INSURANCE—ACCIDENT INSURANCE—SEPTIC POISONING—EVIDENCE—ADMISSIBILITY—PHYSICIANS AND SURGEONS.

   In an action on an accident insurance policy containing a rider covering accidental septic poisoning resulting from external inoculation, where the theory of plaintiff was that insured, a physician, was accidentally inoculated with the septic germs of influenza by a patient he was examining involuntarily coughing in his face, thereby injecting the germs into his mouth, which caused his death, it was competent to establish by said patient what his symptoms were, and by medical evidence what disease such symptoms indicated.

2. SAME—EXPERT TESTIMONY—ADMISSIBILITY.

   Testimony by an officer of defendant insurance company as to the meaning of certain words in the rider, as understood by the "class of people it was intended to cover," *held*, properly rejected, where witness had not qualified himself to testify on the subject.

3. EVIDENCE—CREDIT TO BE GIVEN MEDICAL TESTIMONY FOR THE JURY.

   Where the medical testimony was in conflict, the credit to be given thereto, as well as the other testimony, was for the jury.

4. INSURANCE—ACCIDENT INSURANCE—MEDICAL TESTIMONY—EVIDENCE—CONJECTURE—QUESTION FOR JURY.

   Where the medical testimony of plaintiff, if believed, made as certain as medical testimony can make certain, that deceased had influenza followed by pneumonia, that it was septic in its nature, of a most virulent type, and that it was contracted from the sputum, septic matter, which the patient accidentally threw into insured's mouth, it cannot be said that the cause of his death rests on conjecture, guesses, or speculation, and the case was properly submitted to the jury.

Error to Wayne; Goff (John H.), J. Submitted January 6, 1922. (Docket No. 56.) Decided June 5, 1922.

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Assumpsit by Sarah Dunwoody against the Royal Indemnity Company on a policy of insurance. Judgment for plaintiff. Defendant brings error. Affirmed.

Frederick J. Ward, for appellant.

Howard H. Campbell and *Hollis Harshman,* for appellee.

FELLOWS, C. J. On January 24, 1916, defendant issued a policy of accident insurance to Dr. John F. Dunwoody of Detroit. Plaintiff was named as beneficiary. Attached to and made a part of the policy was the following rider:

"SEPTIC POISONING RIDER (*a*) No. 235.
Royal Indemnity Company.

"In consideration of an additional premium of $1.25 it is hereby understood and agreed that septic infection resulting from external inoculation through accidental contact with septic matter shall be regarded as an accidental bodily injury within the terms of the policy named below.

"This rider is valid only when attached to a policy issued to a physician, surgeon, dentist, undertaker or embalmer.

"Nothing herein contained shall be held to waive, alter, vary or extend any of the conditions, agreements or limitations of this policy, other than as above stated.

"This rider, issued by the Royal Indemnity Company, when countersigned by the company's duly authorized official or agent and attached to Policy No. AR-1799 issued to John F. Dunwoody, M. D., of Detroit, Michigan, shall be valid and shall form part of the policy.

"Countersigned at Detroit, Michigan, this 24th day of January, 1916.

"CHAS. H. HOLLAND,
"Vice-President and General Manager.
"Detroit Insurance Agency,
"Authorized Agent.
"By (signed) L. J. LEPPER,
"Secretary-Treasurer."

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This policy, including the rider, was in force at the time of the events here related. In October, 1918, influenza was quite prevalent in Detroit. On October 9th, Dr. Dunwoody was examining a patient in his office, using a stethoscope. The patient was standing, the doctor sitting in front of him. He directed the patient to take a deep breath. In so doing the patient involuntarily coughed violently, the sputum flying into the doctor's mouth, upon his lips and in his face. Doctor Dunwoody was then in robust health and active in his profession. Two days later he was feverish and the third day took to his bed, and died October 20th.

The defendant having denied its liability, this action was brought. It is the theory and claim of the plaintiff that the death of Dr. Dunwoody was due to the fact that the septic matter which the patient by accidentally coughing threw into his mouth and upon his lips inoculated deceased's system with virulent influenza germs, septic matter, and that this brings the case within the provisions of the rider. This theory was submitted to the jury. To establish her case plaintiff called the patient who coughed in the doctor's face and over defendant's objections he was permitted to testify to his physical condition on the day of the incident. We do not discover any valid objection to this evidence. We think it was competent to establish (1) by the patient himself what his symptoms were, and (2) by medical evidence what disease such symptoms indicated.

One of defendant's officers was called as a witness by defendant and it was sought to prove by him the meaning of certain words in the rider as understood by the "class of people it was intended to cover." An objection to his testimony was sustained, and properly so. He had not qualified himself to testify on this subject. Defendant's medical witnesses were per-

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mitted to fully testify as to the meaning given these words and how they were understood by the profession.

We find no difficulty in following the contention of defendant's counsel that verdicts may not rest on conjecture, guesses or speculation. We do not follow him in his contention that the verdict in this case so rests. Plaintiff's medical testimony, if believed, makes as certain as medical testimony can make certain that deceased had influenza followed by pneumonia, that it was septic in its nature, of a most virulent type, and that it was contracted from the sputum, septic matter, which the patient accidentally threw into his mouth. One of the physicians who attended Dr. Dunwoody testified:

"This was not an ordinary case of influenza. The peculiar part about it was the septic nature of it, the virulence of it."

Another physician who saw him several times during his fatal illness in answer to a hypothetical question said:

"My opinion is that the physician in question contracted influenza from his patient that he treated a few days previous, from direct contact of an infected material from the coughing into his face and mouth. The sputum from the patient with influenza would be septic matter."

Defendant's medical testimony was in conflict with that produced by the plaintiff. The credit to be given the medical testimony, as well as the other testimony, was for the jury. By the plaintiff's medical testimony the cause of Dr. Dunwoody's death was not left to conjecture or speculation unless we are prepared to hold that the opinions of men learned in the medical profession are conjecture and speculation, a doctrine to which we can not subscribe.

In the case of *Sullivan* v. *Modern Brotherhood of*

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America, 167 Mich. 524 (42 L. R. A. [N. S.] 140, Ann. Cas. 1913A, 1116), plaintiff splashed water in her eye while washing clothes. A gonorrheal infection developed in the eye, resulting in its loss. It was held that the cause of the loss of the eye was not so conjectural as to require a directed verdict for the defendant, and that the plaintiff had made a case for the jury of an accidental loss of the eye. A large number of authorities were there considered.

In *Dove* v. *Alpena Hide & Leather Co.*, 198 Mich. 132, deceased while handling hides inhaled septic germs which infected his throat, causing death. It was held that his death resulted from an accident within the meaning of the workmen's compensation act. Mr. Justice BIRD, speaking for a majority of the court, there said:

> "Counsel inquire where the accident is which led to his death. The accidental feature of the case is that by chance the septic germ or germs were taken up by his respiratory organs and carried into his system, an occurrence which the testimony shows probably did happen, but which was unusual in the work at which he was engaged."

The following cases tend to support plaintiff's contention: *Blaess* v. *Dolph*, 195 Mich. 137; *Cary* v. *Insurance Co.*, 127 Wis. 67 (106 N. W. 1055, 5 L. R. A. [N. S.] 926, 115 Am. St. Rep. 997); *Martin* v. *Accident Ass'n*, 61 Hun (N. Y.), 467; *Martin* v. *Indemnity Co.*, 151 N. Y. 94 (45 N. E. 377); *Freeman* v. *Accident Ass'n*, 156 Mass. 351 (30 N. E. 1013, 17 L. R. A. 753); *Omberg* v. *Accident Ass'n*, 101 Ky. 303 (40 S. W. 909, 72 Am. St. Rep. 413); *Delaney* v. *Accident Club*, 121 Iowa, 528 (97 N. W. 91, 63 L. R. A. 603); *Nax* v. *Insurance Co.*, 130 Fed. 985; *United States Mut. Acc. Ass'n* v. *Barry*, 131 U. S. 100 (9 Sup. Ct. 755); *Western Commercial Travelers' Ass'n* v. *Smith*, 29 C. C. A. 223, 85 Fed. 401 (40 L. R. A. 653); *Engels*

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Copper Mining Co. v. *Accident Commission,* 183 Cal. 714 (192 Pac. 845, 11 A. L. R. 785); *San Francisco* v. *Accident Commission,* 183 Cal. 273 (191 Pac. 26). Other cases might be added to this list. Nor is defendant's contention without support. An exceptionally parallel case in its support is *Fidelity & Casualty Co.* v. *Thompson,* 83 C. C. A. 324, 154 Fed. 484 (11 L. R. A. [N. S.] 1069, 12 Ann. Cas. 181), in which case the opinion was written by Justice Van Devanter when he was circuit judge. In that case the court reached a different result, possibly due to the language of the policy, than this court reached in *Sullivan* v. *Modern Brotherhood of America, supra.*

An examination of the authorities is convincing that the plaintiff made a case for the jury.

The judgment will be affirmed.

WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

MICHIGAN EMPLOYERS CASUALTY CO. *v.* DOUCETTE.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—RIGHT OF INSURER TO MAINTAIN ACTION AGAINST WRONGDOER IN OWN NAME.

An insurance company carrying the risk for an employer operating under the provisions of the workmen's compensation act may not maintain an action in its own name against a third party, claimed to be a wrongdoer causing

On constitutionality of workmen's compensation and industrial insurance statutes, see notes in 34 L. R. A. (N. S.) 162; 37 L. R. A. (N. S.) 466; L. R. A. 1916A, 409; L. R. A. 1917D, 51.

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the injury, for the amount paid the employee as compensation under said act, but said action must be brought in the name of the employer under the provisions of the statute (2 Comp. Laws 1915, § 5468) authorizing such action.

2. SAME—ASSIGNMENTS—SUBROGATION.
Under said statute, no assignment is necessary, the right being conferred by way of subrogation.

3. STATUTES—SPECIAL LEGISLATION NOT AFFECTED BY GENERAL—INTENT.
Special legislation is not affected by a later statute of general application unless the legislative intent to do so is clearly apparent.

4. SAME—WORKMEN'S COMPENSATION ACT NOT AMENDED BY JUDICATURE ACT—ACTION.
The requirement in the judicature act (3 Comp. Laws 1915, § 12353), a statute of general application, that actions be brought in the name of the real party in interest, does not affect the provision in the workmen's compensation act (2 Comp. Laws 1915, § 5468) conferring a right of action on the employer against the wrongdoer for the benefit of himself or his insurer so as to require action to be brought by the insurer in his own name, since the latter is special legislation, contractual in its nature, and becomes operative only in case both employer and employee elect to come under its provisions.

Error to Oceana; Vanderwerp (John), J. Submitted April 18, 1922. (Docket No. 69.) Decided June 5, 1922.

Assumpsit by the Michigan Employers Casualty Company, as insurer of an employer, for the amount paid to an injured employee under the workmen's compensation act, against Joseph Doucette, alleged wrongdoer. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

A. S. Hinds, for appellant.

F. E. Wetmore, for appellee.

SHARPE, J. There is but one question presented on this record which we find it necessary to consider. May an insurance company, carrying the risk for an

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employer, operating under the provisions of the workmen's compensation act (2 Comp. Laws 1915, § 5423 *et seq.*), bring suit in its own name against a third party, claimed to be a wrongdoer causing the injury, for the amount paid the employee as compensation under the act? Section 5468 reads as follows:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof, the employee may at his option proceed either at law against that person to recover damages, or against the employer for compensation under this act, but not against both, and if compensation be paid under this act the employer may enforce for his benefit or for that of the insurance company carrying such risk, or the commissioner of insurance, as the case may be, the liability of such other person."

This section confers a right of recovery on the employer. It provides that he "may enforce for his benefit or for that of the insurance company carrying such risk" the liability of the wrongdoer to the employee. No assignment is necessary. The statute confers the right by way of subrogation. Such right, however, is conferred upon the employer only, though it may be exercised for his own benefit or for that of the insurance company carrying his risk.

Plaintiff's counsel in his brief concedes that an action brought in the name of the insurance company could not have been maintained prior to the enactment of the judicature act. Section 2 of chapter 12 of that act (3 Comp. Laws 1915, § 12353) reads as follows:

"Every action shall be prosecuted in the name of the real party in interest, but an executor, administrator, guardian, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party expressly authorized by statute, may sue in his own name without joining with him the party for whose benefit the action is brought: *Provided*, That any person to whom a cause

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of action shall accrue upon the bond of any public officer, required to give bond to the people of this State, may prosecute a suit for recovery on said bond in his own name: *Provided further,* That actions upon any bond, contract or undertaking lawfully made with any officer of this State, or of any county, township, school district, city or village, or to enforce any liability or any duty enjoined by law to said officer, shall be brought in the corporate name of the body for whose benefit such contract was made, or such liability or duty enjoined."

Under the former statute (3 Comp. Laws 1897, § 10054) the assignee of a chose in action might, at his option, bring suit in his own name or in that of his assignor, except that in the case of negotiable instruments assigned without indorsement the assignee must sue in the name of his assignor. Under the present statute this exception no longer exists. Besides, what was formerly permissive is now mandatory. All suits must be prosecuted in the name of the real party in interest.

The question presented is whether section 12353 modifies section 5468. The workmen's compensation act is special legislation, enacted for a specific purpose. *Mackin* v. *Detroit-Timkin Axle Co.,* 187 Mich. 8. Under it an employer is compelled to pay compensation to an injured employee when not otherwise legally liable to do so. His obligation is statutory and contractual in its nature. The act becomes operative only in case both employer and employee elect to come under its provisions.

It is a general rule that special legislation is not affected by a later statute of general application unless the legislative intent is clearly apparent. *People* v. *Wenzel,* 105 Mich. 70; *Maclam* v. *City of Marquette,* 148 Mich. 480; *Edwards* v. *Auditor General,* 161 Mich. 639; *Boos* v. *Scudder,* 163 Mich. 678; *Hopkins* v. *Sanders,* 172 Mich. 227; *Port Huron Engine, etc., Co.* v. *Port Huron Township,* 191 Mich. 590.

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In 36 Cyc. p. 1092, it is said:

"A special act providing a special or summary mode of procedure in a particular case is not affected by a subsequent general act relating to procedure, unless there is found in the subsequent act a direct indication of an intent to repeal such special act."

Section 5468 is found in part 3 of the act, which deals with "procedure" under it. We feel constrained to hold that this provision of the judicature act, it being a statute of general application, and in no way referring to section 5468, should not be held to be amendatory thereof or to enlarge the rights conferred thereby.

It follows that the verdict for defendant was properly directed and the judgment entered thereon is affirmed, without prejudice.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

FREBES v. MICHIGAN CENTRAL RAILROAD CO.

MASTER AND SERVANT — RAILROADS — NEGLIGENCE — EVIDENCE — DIRECTED VERDICT.

In an action by a "car rider" on a switch engine for personal injuries caused by the derailment of the engine by a coupling knuckle in a frog in the track, a verdict was properly directed in favor of defendant in the absence of evidence of any actionable negligence on the part of defendant or its employees.

Error to Wayne; Perkins (Willis B.), J., presiding.

On constitutionality, application and effect of Federal employers' liability act, see notes in 47 L. R. A. (N. S.) 38; 48 L. R. A. (N. S.) 987; L. R. A. 1915C, 47.

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Submitted April 25, 1922. (Docket No. 137.) Decided June 5, 1922.

Case by George P. Frebes against the Michigan Central Railroad Company for personal injuries. Judgment for defendant on a directed verdict. Plaintiff brings error. Affirmed.

Walter M. Nelson (*John D. Lynch*, of counsel), for appellant.

J. Walter Dohany (*F. E. Robson*, of counsel), for appellee.

MOORE, J. This is an action brought by George P. Frebes, under the Federal employers' liability act (35 U. S. Stat. chap. 149, p. 65), to recover for personal injuries sustained by him on October 23, 1917, while in the employ of the Michigan Central Railroad Company as a car rider in its junction yards at Detroit, Michigan. The defendant has the junction switching yards, where incoming freight trains are broken up and outgoing freight trains are made up. On each car as it is so switched rides a switchman who is called a car rider. His duty is to stop the car at the proper place, and open the coupler so that the next car will couple to it without difficulty. The plaintiff was working as a car rider at the time he was injured. In the yard is a switch engine commonly referred to as a trimmer which moves the cars. It is equipped with foot boards extending across the entire width of the engine both in front and rear a few inches above the ground. These foot boards are for the switchmen and car riders to ride upon. In the course of his duties Mr. Frebes stepped upon the front running board and stood upon the right or engineer's side of the board. He turned around to take the number of the engine which was on a plate on the front of the boiler. At that moment the engine was derailed and

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Mr. Frebes received serious injuries. The engine was derailed by a knuckle which was at a frog on a switch track leading off the main track. A knuckle is a part of a coupling on a car. It is made of cast iron or steel. When all the testimony had been given the trial judge was of the opinion that no actionable negligence had been shown and directed a verdict in favor of the defendant. The case is brought here by writ of error.

Two propositions are argued in appellant's brief:

(1) Was defendant engaged in interstate commerce at the time plaintiff received his injuries?

(2) Was there any evidence of negligence on the part of the defendant?

We recognize the well-established principle that the plaintiff is entitled to have his evidence given the most favorable construction it will bear and to have the benefit of every fair inference that may be drawn from the evidence guided by sound processes of reasoning and applicable principles of law. See *Benjamin* v. *McGraw*, 208 Mich. 75; *In re Bailey's Estate*, 213 Mich. 344; *Douglas* v. *Insurance Co.*, 215 Mich. 529, 533; *Wood* v. *Vroman*, 215 Mich. 449.

In our view of the case the pivotal question is, Did the plaintiff show actionable negligence on the part of the defendant? It is insisted that, if the engineer had been looking, he would have discovered the obstruction in time to have stopped his engine, and that, taking all the facts and circumstances surrounding the occurrence, it presented a case for a jury. We quote from the brief:

"The happening of the accident taken in connection with the surrounding circumstances raises a presumption of defendant's negligence which constitutes a *prima facie* case for the jury. *Burghardt* v. *Railway*, 206 Mich. 545; *O'Donnell* v. *Lange*, 162 Mich. 654; *Sewell* v. *Railway*, 158 Mich. 407; *Chapman* v. *Express Co.*, 192 Mich. 654."

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When the accident happened it was a rainy day and the scope of vision was limited. It may be well to now quote some of the testimony of the plaintiff:

"While we were going down to get the rest of the riders and after we ran in on this short lead, the engine got derailed. I do not think all the wheels were off the rails, but most of them were. The engine was not off the ties. The moment it struck, Mr. Montgomery hollered at me. I was taking down the number of the engine, had just glanced up there. He hollered. The engine struck something and threw it right end up and threw me off right under the engine. The engine struck just about the same time he hollered. I did not have time after hearing his voice to jump off his engine, for it all happened in a fraction, in a very short time at least.

"Montgomery jumped just as he hollered, but it did not in any way cause my injury, for his jump did not and could not throw me off. He jumped off the left side, and when the engine was derailed that threw me off, the engine jumped to the south of the rails, and the wheels were right down on the ties. Whatever it was threw the front end of the engine up and that is what threw me off. I was thrown off right between the rails of the track on which this engine was traveling, right in front of the engine. I did not see any obstruction to the engine passing along in its usual manner. I did not see anything. I do not, of my own knowledge, know what derailed the engine. Standing on the foot board as I was, I was practically over the rail. The engine did jump the track, and its jumping threw me off. * * *

"*A.* No. that is the first engine I have seen derailed since I have been working for the company."

We quote from his recross-examination:

"I never saw a knuckle out there on the tracks, and in the two months I worked there the yards were always kept clean and everything picked up. Inspectors and track men went over the yards continually picking up everything all the time, and kept it all clean. They went back and forth all over the tracks and there were a number of men in that yard doing that kind of work, and I knew they were there for that purpose.

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"Q. And you, from your experience there, saw that track, the lead track and the other tracks you worked on were kept clean?
"A. Yes.
"Q. All the time you were there?
"A. Yes.
"Q. No obstructions?
"A. No.
"Q. No knuckle?
"A. No.
"Q. Coal that fell off a car being moved would be immediately picked up?
"A. Yes.
"Q. And so, for a knuckle to be on either one of these tracks from the experience you had there, and seeing the tracks were kept so clean would be a most unusual occurrence?
"A. That is the first I have seen.
"*The Court:* Well, did you see that one?
"A. Well, no, I didn't see it. * * *
"Q. Now, looking at the number was a matter of only a moment, wasn't it?
"A. Yes, sir.
"Q. So you had your eyes away from the front direction in which you were going but a very short time?
"A. Yes.
"Q. A matter of two or three seconds?
"A. Just a short time; yes, sir.
"Q. And prior to the looking at the number, you said you had your eyes in the direction in which you were going and looking forward on the track?
"A. Yes.
"Q. And you saw nothing?
"A. No.
"Q. And you momentarily glanced around at this number, which took two or three seconds, and the accident happened?
"A. Yes, sir."

Witness Montgomery, who was riding on the front foot board with plaintiff, testified in substance that he

"saw something on the track when he was about 50

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feet from it, the engine at the time moving 6, 7 or 8 miles an hour, but did not know what it was and waited until he got within two feet of it when he saw it was a knuckle and hollered to Frebes to jump. The knuckle was lying alongside the track in the frog. When witness first saw the object he could not tell what it was because of the peculiar position it was lying in on its back flat in the heel of the frog and could not discern it until he got close and as soon as he got close enough to see what it was he jumped. He could not tell what it was until the knuckle was about 2 feet from the foot board. He jumped just as soon as he saw what it was. Being in the frog it was lying right between the two railroad rails where they branch out from each other. The day was drizzly, rainy, cold, damp, cloudy and overcast. He had been working in the yard prior thereto and had not seen this knuckle in his traveling down the yard. He was back and forth over the same tracks around 20 times in the forenoon and saw no knuckles there. He saw another yard engine making up trains, working back and forth over the same lead track with and without cars, making moves all the forenoon."

We have gone over this somewhat lengthy record with great care. We do not find in it any evidence of negligence on the part of the defendant. We agree with the trial judge when he said:

"The engine was derailed and I assume that it was derailed because this knuckle was in this frog; it has not been shown that a single person in the employ of the defendant railroad company knew that that knuckle was there until a few seconds before the injury. Nothing has been shown by which the jury could infer, in my judgment, that by reasonable inspection the knuckle could have been observed in time to have averted the accident to the plaintiff. There is nothing in the case, as I have already said that indicates that the defendant was not performing its full duty with reference to inspection, and we all know the fundamental rules with respect to the duty of an employer to inspect. It is fundamental that there must be either actual or constructive notice of the danger and a reasonable opportunity given to the em-

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ployer to remove it before he can be charged with actionable negligence.

"I do not believe, gentlemen, that this case can go to the jury on the subject of the alleged negligence of the defendant because in some way or other this knuckle got into this frog on this particular occasion.

"The only other question is as to whether the engineer by the exercise of reasonable care should have seen this knuckle in time to have averted the injury.

"The plaintiff's own testimony convinces me that that could not have been done. It is not a question of fact to be submitted to the jury as to whether he could or could not have seen it; it would be pure conjecture. The plaintiff's own witness testified that he was watching it in the mist and rain of that morning; he could not observe until he reached within three or four feet of it and then he discovered what it was, gave the warning and leaped to safety himself.

"Now it would be presumptuous in the face of the plaintiff's own testimony to submit a question of inference to this jury whereby they might decide contrary-wise and that the engineer could have seen over his engine and 50 feet ahead of his engine, and still determine that that was a knuckle and stop his engine in time to have avoided the injury. I do not believe that is a question for the jury, but rather under the undisputed facts it drifts into the realm of mere conjecture and does not come within the field of legitimate inference from the testimony."

See *Toomey* v. *Steel Works,* 89 Mich. 249; *Culver* v. *Railroad Co.,* 138 Mich. 443; *Micari* v. *Monroe Stone Co.,* 154 Mich. 362; *Beach* v. *Railroad Co.,* 180 Mich. 524; *Meyer* v. *Grand Rapids Chair Co.,* 180 Mich. 604.

Having reached this conclusion, it is unnecessary to discuss the other question.

Judgment is affirmed, with costs to the appellee.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

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FLINT P. SMITH BUILDING CO. *v.* INDUSTRIAL SAVINGS BANK.

1. ARBITRATION AND AWARD—AWARD NOT VALID UNLESS CONCURRED IN BY ALL ARBITRATORS.

Where a lease provided that in case the parties thereto were unable to agree upon the rent to be paid, "then each of said parties shall select one arbitrator, and the two arbitrators so selected shall select a third arbitrator, and the three arbitrators so selected shall fix and determine the rent to be paid," the finding of the arbitrators to be final and binding upon the parties, an award concurred in by two of the arbitrators only was not valid, since the language of the lease clearly provided for an award by three arbitrators.

2. SAME—AWARD OF ARBITRATORS NOT BINDING ON COURT.

On appeal by the lessee from the decree of the court below fixing the rent at $9,000 a year, its contention that, even if the award of the two arbitrators fixing the rent at $6,000 a year was not binding on the parties, the decree should have fixed the rent in accordance with that award, cannot be sustained, where the amount fixed in the decree is justified by the record.

Appeal from Genesee; Williams (William B.), J., presiding. Submitted January 19, 1922. (Docket No. 105.) Decided June 5, 1922. Rehearing denied July 20, 1922.

Bill by the Flint P. Smith Building Company against the Industrial Savings Bank to set aside an award of arbitration, and to determine the rent to be paid under a lease. From a decree for plaintiff, defendant appeals. Affirmed.

George W. Cook (*Charles A. Withey*, of counsel), for plaintiff.

Farley & Selby, Leo M. Butzel and *William L. Carpenter* (*Stevenson, Carpenter, Butzel & Backus*, of counsel), for defendant.

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MOORE, J. The chancellor filed a written opinion in this case reading as follows:

"Plaintiff, a corporation, is the owner of lot 10, block 1, in the city of Flint, Michigan, having a frontage of 33 feet on Saginaw street and a depth of about 150 feet along Union street on which there is a 9-story office building known as the Flint P. Smith Building with basement, the ground floor of which was constructed especially for a banking business with lobby in front leading to the elevators and the bank. September 23, 1912, the then owners of said property, grantors of plaintiff, leased to the Industrial Savings Bank for the purpose of conducting a general banking business, the ground floor in the rear of the lobby in the Flint P. Smith Building, the vaults in the basement to said building, with the right to ingress and egress thereto, and so much of said basement as may be necessary to use said vaults, the use of the lobby in said building for ingress and egress to the rear thereof, with the right to use the windows therein for advertising banking business of said Industrial Savings Bank, and also the right and privilege of using the front of said building to display the sign or signs of said bank for the period commencing with the time when said building should be made ready for occupancy by said bank and extending to and including June 30, 1939.

"By the terms of the lease lessor agreed to heat said leased premises when necessary, and to furnish said lessee with city water and janitor service for the corridors of the bank. The premises leased to the bank were completed ready for occupancy May 1, 1913, and they took possession on that date. The term for which said premises was leased was divided into 5 rental periods, the first 4 periods to consist of 5 years each and the fifth period for the unexpired portion of the time. The rent for the first period was fixed by the lease at $2,000 per year, payable monthly in advance.

"By the terms of the lease, the rent for the remaining rental periods is to be determined for each term in advance by agreement between the parties, and in case the parties were unable to agree upon the rent to be paid, then each of said parties should select one

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arbitrator, and the two arbitrators so selected should select a third, and the three arbitrators so selected should fix and determine the rent to be paid by the bank to the lessors for the ensuing rental period; that the arbitrators chosen to fix the rent for any rental period should as a basis for fixing the rent for that period, take into consideration the character of the property rented, its location, the heating and services rendered by the lessors, the increase or decrease in the population of the city and the then general rental values of business property in the business district in the city of Flint, and the finding of the arbitrators chosen to fix the rent for each rental period should be final and binding upon all of said parties for the period for which it was fixed, and during such rental period said bank should pay to the lessors. and the lessors should receive the rent so fixed and determined by the arbitrators chosen for that period.

"The first 5-year rental period having expired on the 30th day of April, 1918, and the owners of said building and said Industrial Savings Bank not being able to agree upon the rent which should be paid by said bank to said owners for the ensuing 5-year period, thereupon in pursuance of the terms of said lease the owners of said building and said bank proceeded to have the rent fixed by arbitrators chosen in the manner prescribed in said lease, and John J. Carton, Charles M. Greenway and John L. Pierce were chosen as arbitrators. The arbitrators so chosen were unable to agree on the rent to be paid by defendant to plaintiff for said premises, for the 5-year rental period commencing May 1, 1918, Messrs. Carton and Greenway signed an award fixing the amount at $6,000 per year, and Mr. Pierce signed a statement to the effect that he refused to concur in said award, giving his reasons therefor. Plaintiff, claiming that the award is void because not concurred in by all three of the arbitrators, filed this bill to have the same judicially determined to be void, and to have the court determine the rent that should be paid by defendant to plaintiff for the 5-year period commencing May 1, 1918. Defendant in its answer insists that the award, though concurred in by only two of the arbitrators, is valid and has tendered the rent at the rate fixed by the award, which plaintiff has refused to accept.

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"I am of the opinion that the award is invalid. That in submitting this matter to three arbitrators it was contemplated by the parties that they should have an award concurred in by all of them. A majority of the arbitrators may not render a valid award. *Lattin* v. *Gamble*, 154 Mich. 177. Our statute provides for an award by a majority of the arbitrators. 3 Comp. Laws 1915, § 13652. This is a part of the statute providing for a statutory award. I think in other States where there is a similar statute the decisions of the court are uniform to the effect that the statute applies to statutory awards only.

"It is suggested in the bill that there were some acts on the part of Mr. Carton, one of the arbitrators, on account of which the award should be held invalid. There is nothing in the testimony that should give rise to even a suspicion of misconduct on the part of Mr. Carton, and I base my conclusion that the award is invalid entirely on the fact that it was concurred in by but two of the arbitrators.

"We now come to the real live issue in this case, viz., what rent should be paid by defendant to plaintiff for the 5-year rental period from May 1, 1918, for the premises occupied by it, and the services rendered by plaintiff. This must be determined by conditions that would affect the rental value existing May 1, 1918, and which might reasonably be expected to obtain during the 5-year period in view of past events and future probabilities. The court in fixing the rental must be governed by the limitations in the lease placed on the arbitrators in that regard. I find myself embarrassed at the threshold of this inquiry. One who can forecast rental values in Flint in abnormal times for a period of 5 years must have occult power.

"Counsel in the case in elaborate and well considered briefs reach results that are $8,000 apart on the yearly rental. I knew they would not intentionally lead the court astray. The testimony of 12 reputable business men of Flint varies from $4,800 to $18,000 per year as to what the rent should be fixed and determined as of May 1, 1918, on the basis stipulated in the lease for the 5-year period. I have read the testimony with care, and I am unable to find a test which, when applied, satisfies me that I have

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reached a result that may be more than approximately mathematically correct.

"There was no building in Flint May 1, 1918, with which the building in question could be compared. It was *sui generis*. Comparing rental value per square foot space in this building and old buildings that were required to be completely remodeled before suitable for occupancy by merchants pretending to be up-to-date, throws but little light on the merits of this controversy. I am convinced that the rental value of the ground floor occupied by the bank is enhanced by having offices in the floors above occupied by those engaged in various lines of business, and that the corridor between the bank and the street does not detract from the desirability of the bank quarters for banking purposes. I am satisfied that the amount fixed by Mr. Carton and Mr. Greenway is too small. If I were authorized to fix the rental at what I thought it ought to be, the amount would be less than it will be. I believe the general rental values in the business district in Flint in May, 1918, were too high, and if so, then a rental for the premises in controversy fixed on the basis of the general rental value of other business property in Flint in May, 1918, must of necessity be too high, at least when viewed as a conservative business proposition.

"There runs through the testimony of Mr. Carton and Mr. Greenway the thought that rents of business property in May, 1918, were too high, and they probably fixed the amount at what they thought it ought to be as an abstract proposition rather than as compared with rents that they believed to be exorbitant. On the other hand, those who testified that the rental should be from $12,000 to $18,000 per year were doubtless unwittingly influenced by the fact that an unprecedented boom in Flint had brought about conditions when one could get as rental for business property in Flint much more than they would have thought of asking in normal times.

"I think there must be somewhere between these two extremes where the just legal rights of the parties to this controversy may rest. I fix the amount of rent to be paid by defendants to plaintiff at $9,000 per year from May 1, 1918, for the ensuing 5 years. Said sum to be paid $750 monthly in advance, with interest on

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the deferred monthly payments at 5 per cent. per annum."

A decree was entered in accordance with the opinion. The case is brought to this court by appeal.

The first question presented is, Was the award valid? Counsel insist it is, we quote from the brief:

"Messrs. Carton, Greenway and Pierce were appraisers, not arbitrators, and if two arbitrators could make an appraisal, the appraisal made by Messrs. Carton and Greenway was valid.

"The distinction between arbitrators and appraisers and the difference of their official duties is nowhere pointed out with greater clearness than in *Omaha Water Works Co.* v. *City of Omaha,* 89 C. C. A. 205, 162 Fed. 225 (15 Ann. Cas. 498)."

In considering this quotation it may be well to refer to the lease:

"The rent to be paid by said lessee to the said lessors for each of the remaining rental periods shall be determined in advance by agreement between the parties for the ensuing rental period, and in case the parties hereto are unable to agree upon such rent, then each of said parties shall select one arbitrator and the two arbitrators so selected shall select a third arbitrator and the three arbitrators so selected shall fix and determine the rent to be paid by the said lessee to the said lessors for the ensuing rental period. As a basis for fixing said rent said arbitrators shall take into consideration the character of the property rented, its location, the heating and service rendered by said lessors to said lessee, the increase or decrease of the population of the city and the then general rental values of business property in the business district of the city of Flint. The findings of said arbitrators so chosen for each rental period shall be final and binding upon the parties hereto, and said lessee agrees to pay to said lessors the rent so agreed upon between the parties or so fixed by said arbitrators, and the said lessors agree to receive the amount so agreed upon or the amount so fixed by said arbitrators as the rent for said premises for said period."

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It is evident that the parties to the lease had provided for the selection of arbitrators and for arbitration in case of disagreement, and that "the three arbitrators so selected shall fix and determine the rent to be paid." Both parties agreed that "the findings of said arbitrators so chosen" should be final and that they would both abide by the award. The language of the lease is not ambiguous and as to this feature of the case the chancellor was clearly right.

Was the rental fixed in the decree wrong? It is argued and we again quote from the brief:

"Even if the appraisal by two appraisers was not binding, the trial judge should have fixed the rent in accordance with that appraisal."

It is urged that the two appraisers, as counsel call them, followed the provisions of the lease and that the decree should follow their findings. The three arbitrators were each sworn as witnesses. Two of them testified that $6,000 a year was a fair rental. The third one thought $12,000 was a fair rental. More than 30 witnesses were sworn; they differed greatly in their estimates of the rental value, 8 of them placing it at $12,000 and upwards. Two of them fixing it at $18,000 a year and one of them at $20,000 a year. An examination of the entire record does not satisfy us the decree should be disturbed.

It is affirmed, with costs to the appellee.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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TORRENT v. TORRENT.

1. FRAUD—DEEDS—TRUST DEED—CANCELLATION OF INSTRUMENTS—EVIDENCE—SUFFICIENCY.

   On a bill by the grantor to set aside a certain trust deed on the ground that its execution was procured by false and fraudulent representations, and that she did not fully understand that she was conveying property claimed by her to be her individual property as well as property belonging to her husband's estate, evidence *held*, insufficient to maintain the burden of proof assumed by plaintiff.

2. SAME—TRUST DEED MUST STAND OR FALL AS WHOLE.

   Since the trust deed must either stand or fall as a whole, where the evidence is insufficient to warrant setting it aside, plaintiff's bill will be dismissed.

Cross-appeals from Muskegon; Davis (Frank D. M.), J., presiding. Submitted October 7, 1921. (Docket No. 66.) Decided June 5, 1922.

Bill by Caroline Torrent against Squire E. Torrent and others to set aside certain deeds. From the decree rendered, plaintiff and certain defendants appeal. Reversed, and bill dismissed.

A. W. Penny, for plaintiff.

Norris, McPherson, Harrington & Waer (*Arthur B. Schaffner*, of counsel), for appealing defendants.

SHARPE, J. The plaintiff is the widow of John Torrent, long a resident of Muskegon county, who died on October 21, 1915. They were married in 1858. He became active in the lumber business and gradually acquired considerable property. In 1875 he purchased certain real estate in the city of Muskegon, now known as lots 5 and 6 of block 334, the title being

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taken in the name of plaintiff. The consideration paid therefor was $8,000. In 1893-1894, a stone dwelling house was erected on this property, costing nearly $100,000. Opinions as to its present value range from $35,000 to $50,000. On September 28, 1908, John Torrent executed a last will and testament. By the third paragraph he bequeathed to the plaintiff all the household furniture and certain other articles of personal property. The fourth paragraph provided:

"I give, bequeath and devise to my wife, Caroline Torrent, the use and occupation for the period of her natural life, of any dwelling house in the city of Muskegon and county of Muskegon of which I shall die seized of and possessed of. The selection of such dwelling house to be made by her. And it is my will that the provisions in this instrument in regard to my wife, Caroline Torrent, shall be in lieu of dower and of all and any claims and demands of every name, nature or kind she might have or urge against my estate."

After some minor bequests, the residue of his property was left to the Michigan Trust Company of Grand Rapids and its successors, in trust, to hold and manage the estate and distribute the income thereof as therein provided. The trust company was also named as executor of the will. This will was admitted to probate in Muskegon county on December 13, 1915. On March 13, 1916, the plaintiff filed an election to take as widow under the statute. The estate was administered by the trust company, final account filed and allowed, and order assigning residue made. A representative of the trust company, in searching among the papers of the deceased, found in a vault in the residence, in which the papers of both Mr. and Mrs. Torrent were kept, a conveyance from her to him of the residence property and other real estate, dated August 9, 1898, duly witnessed and acknowledged.

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This property was thereafter treated by the executor and trustee as a part of the estate.

In the meantime, on March 11, 1916, an agreement was entered into between the plaintiff and the defendants Squire Torrent, Ray H. Torrent and John Torrent, three of her children, and H. Monroe Dunham, an attorney of Grand Rapids, by which Mr. Dunham was to institute proceedings to set aside or modify the trust provision in the will. Proceedings were begun by him in the circuit court for the county of Muskegon, in chancery. Later, a bill was filed in the district court of the United States for the western district of Michigan, northern division, in which Ida M. Lange, John T. Stever and Helen Stever Everington, three of the defendants herein, who are children of Nellie Torrent, a daughter of the plaintiff and her husband, then deceased, were made plaintiffs and the trust company as executor, the plaintiff and the other heirs of the deceased were made defendants. A decree was rendered in this suit on January 11, 1917, construing the will and holding certain of the trust provisions void and of no effect. As before stated, the plaintiff had theretofore elected not to take under the will. Soon after the beginning of this suit, Mr. Dunham as her attorney filed a bill of complaint in the Muskegon circuit court to set aside the deed of the stone house property, and this was pending when the decree in the Federal court was made.

After the filing of this decree, conferences were held by all the parties in interest, or their attorneys, looking to a settlement of all matters in controversy between them relative to the estate. As a result thereof, a trust deed was executed on May 18, 1917. In it the plaintiff, in her own right and as widow of John Torrent, and all the heirs of the deceased, one of them a minor by his guardian, were first parties and the Grand Rapids Trust Company the second party.

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Its length, covering more than 30 pages of the printed record, precludes our quoting it in full. All of the assets of the estate are specifically set forth in it, and these were all transferred by it to the trust company. The stone house property was included therein. By its terms, the beneficial interests under the trust thereby created were divided into 1,400 shares, represented by the respective interests of the parties, and the form of the share certificates to be issued to each of them was set forth. The plaintiff was not named in or treated as a beneficiary. The undertaking on the part of the trust company was to convert the assets of the estate into cash, then to pay the expenses of the trust, to pay to plaintiff $200 per month during her natural life, to purchase and erect a suitable monument to the memory of the deceased, and to divide and distribute the balance in conformity with the trust share certificates to be issued. In addition to the monthly payment to plaintiff, the deed provided that she should occupy the stone house property without payment of rent and that in case it should be sold the trustee should, if requested by her, construct upon other property of the estate a suitable and convenient dwelling house to cost not more than $5,000 and permit her to occupy it during her lifetime without rental therefor, or, at her option, pay to her an additional $50 per month in lieu of such occupancy. Taxes and repairs were also to be paid by the trustee. The other provisions of the trust deed are not material to the issue here presented.

The bill of complaint herein, filed on November 3, 1919, alleges that the plaintiff at the time the trust deed was executed was about 78 years of age and infirm in body, that she—

"did not know, nor was she informed, that same included her own individual property (that described in her deed to her husband) but was expressly in-

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formed by said Dunham and the conspiring defendants that her individual property was not included in said instrument; that she only recently became cognizant that her said individual property was included;"

that its execution by her was procured by "false and fraudulent representations," and that such deed is a cloud upon her title to such real estate. In her prayer for relief she asks: That the deed from her to her husband, found among his papers, and the trust deed executed by her be set aside and decreed to be null and void and the trustee be required to account for all moneys received by it under the trust and the estate distributed to the persons legally entitled to the same.

The defendants Lewis Torrent, Squire E. Torrent, John Torrent, Ray H. Torrent and Russell Torrent in their answers admit the truth of the allegations in the bill and say that plaintiff is entitled to the relief prayed for. The infant Fred Torrent, appearing by his guardian, leaves plaintiff to her proofs, but denies that she is entitled to any relief. The trust company and the defendants Ida M. Lange, John Stever and Helen Stever Everington admit certain allegations in the bill but deny those on which plaintiff's claim for relief rests.

The proofs were taken in open court. The trial court found that the plaintiff signed the trust deed relying on the advice of her attorney; that she did not know that her individual property was included therein. The decree sets aside the deed of August 9, 1898, from plaintiff to her husband, reforms the trust deed to exclude therefrom the stone house property, and quiets plaintiff's title thereto. It requires plaintiff to pay to the trust company the amounts expended by it for repairs and insurance pursuant to the terms of the trust deed, amounting to $3,978.43, with interest.

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It orders that the monthly payments to plaintiff of $200 provided for in the trust deed be continued. It allows plaintiff costs, including an attorney fee of $1,500. From this decree the defendants trust company, Lange, Stever and Everington appeal. Notice of appeal was also given by plaintiff.

Trust Deed. The claim of the plaintiff is thus stated:

"That Mr. Dunham without previously interviewing her concerning placing this estate in a trust, called upon this old lady with the trust deed in question, unfinished and unbound, he representing dual interests, and requested her to sign name. She did not read the instrument, neither did he read it, except in part to her. Before she signed the instrument she asked him if the trust deed interfered with her property, if he was attending to her affairs and he replied that it had nothing to do with her property and he also assured her that the signing of the trust deed would not interfere with her suit then pending to restore to her the record title to her home, lots five (5) and six (6)."

She testified:

"I remember that incident. I remember that in May, 1917, myself and my children signed a certain instrument which is known here as the 'trust deed.' Before that trust deed was signed, neither Mr. Dunham or any one else talked it over with me in regard to signing any deed or trust or anything. Mr. Dunham had not talked with me about it or ever been to the house about it. * * * When Mr. Dunham came to my house he had some paper with him. He did not say it was a trust deed. The papers were just loose papers. He said it was not finished. The paper was not bound together by eyelets as the paper shown me is, because he said he did not have it all there. I signed it. Before I signed it I said something to Mr. Dunham about signing it.

"*Q.* What did you say?

"*A.* I asked him if that interfered with my property and if he was attending to my affairs, and he said

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'Oh, yes, that is all right; that has nothing to do with this, whatever.'

"*Q.* He said that had nothing to do with this?

"*A.* The signing of that trust deed or whatever it was.

"*Q.* That it had no reference to your property?

"*A.* No, it had no reference to my own property.

"*Q.* Did you later find out that some of your own property was included in that trust deed?

"*A.* I found out later on."

Ella Torrent, the wife of the defendant John, testified:

"I saw Caroline Torrent sign this instrument. * * * She said several times to him (Dunham) 'Does this interfere with me or my property, or my home, or will it interfere with the suit that is pending in regard to my home?' and he said, 'No, not at all, it will be all taken care of.'"

John Torrent testified:

"Before that deed was signed it was not read over there to us people. We were all together all the time. The instrument as presented by Mr. Dunham was in loose leaves. It was not bound. Just portions of it were read over to us. None of the descriptions were read. When I executed the deed that evening I did not know that it contained these lots 5 and 6, being the stone residence property at the corner of Third and Webster avenue in the city of Muskegon.

"*Q.* When did you first ascertain that fact to be true?

"*A.* A short time afterwards.

"*Q.* Through whom or how?

"*A.* In looking over the trust deed, the descriptions, I seen that.

"I didn't convey that information to my mother because I didn't care to worry her about it."

This testimony, standing alone, goes far to support the claim of the plaintiff. It is contradicted by Mr. Dunham. Addie L. Cheeseman, who was called on by John Torrent to take the acknowledgment, testified

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that the pages of the deed were at that time bound together as they were when put in evidence on the trial.

In view of the charge made against Mr. Dunham, a reputable attorney of Grand Rapids, and the interests of plaintiff, a woman of such advanced years, we have given more than our usual attention to the facts disclosed by this record. The events preceding and following the execution of the trust deed shed considerable light upon the transaction. The plaintiff testified:

"I tried myself personally to get an agreement with Mr. Lange and the other heirs back in the latter part of 1916 to get all of this litigation over and all the estate settled up."

When the decree of the Federal court construing the will was made, her suit to set aside the deed from her to her husband was pending. What interest she would take under the will was in dispute. On objection of plaintiff's counsel, Mr. Dunham was not permitted to testify to conversations with plaintiff before the negotiations leading up to the making of the trust agreement. He testified that he had frequent conversations with her relative to the provisions which were to be included in the deed; that Mr. Wilson, the secretary of the trust company, was with him on at least one occasion when plaintiff and several of the other heirs were present; that they were there at least two hours and Mr. Wilson explained fully the condition of the estate to them; that the homestead property was talked about and a suggestion made about building her a smaller home. (Unfortunately, the death of Mr. Wilson occurred before the trial of the cause.) He further testified that plaintiff did not consider the homestead as her individual property and that she told Mr. Wilson "she wanted all of the children to share alike." On July 30, 1917, about ten

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weeks after the deed was executed, the president of the trust company wrote plaintiff:

"Under the terms of the trust agreement you are entitled to occupy your present home until it is sold, after which we are to build you a house to cost not less than $5,000 on the Webster avenue property. This, of course, would necessitate the wrecking of the present building, making it practically worthless. The lot itself is worth from $3,000 to $3,500. Of course, the house as it stands would not do for you at all. In case you relinquish your right to the new house on Webster avenue property, you are entitled to an additional $50 per month during your lifetime. This $50 a month, of course, would be subject to no liens and would be entirely at your own disposal.

"We do not want to influence you in any way regarding this matter. If you think you would rather have $50 a month than the new house we will make the sale. Of course, there is no telling when we can sell the premises you now occupy. During your occupancy of that house, of course, the $50 a month will not be paid you.

"I am inclosing herewith an order for you to sign if you wish to make this disposition of the Webster avenue property. We think the offer is a very good one but, of course, will be guided entirely by your wishes in the matter."

To this she replied on August 15, 1917:

"This is to notify you that it is my wish that the Webster avenue property be sold at a sum not less than $6,000, in which case and in case of the sale of the premises I now occupy I am to have an additional sum of fifty dollars per month during my lifetime in lieu of the use of the new house on Webster avenue."

These letters are quite convincing that on August 15th plaintiff knew that the homestead property was conveyed by the trust deed and had knowledge of the provisions in the deed for her benefit in the event that it should be sold by the trust company. The statement of her son, John Torrent, a witness in

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her behalf, that he knew this property was included in the deed four days after its execution but said nothing to his mother about it is significant. It also appears that on January 11, 1918, she wrote the trust company, calling attention to the fact that it was not the intention to include in the trust deed 30 acres, the title to which was in her name, and saying that she had already conveyed some of the land by deed and sold other parts on contract, and asked that it be deeded back to her. This request was conveyed to the several heirs and by their consent a reconveyance made to her by the trust company. It is her claim that at this time she had not discovered that the homestead was included in the trust deed. John Emerson, a real estate dealer in Muskegon, testified that in July, 1917, he went to the home in company with Mr. Closterhouse, an official of the trust company in charge of its real estate, and on being informed who they were and their purpose she showed them through the rooms and the basement. He further testified:

"About a month later I got an opportunity to sell the property known as the McNiss house on Webster avenue, and I understood Mrs. Torrent had something to say whether this property should be sold or not, and I went to see her about it at that time and had a conversation with her. She said that at the time she deeded the home and the property to the Grand Rapids Trust Company, trustee of the Torrent trust; that she would receive $200 a month and that if the Torrent home was sold she was to have the home built on this property on Webster avenue, to cost $5,000, and she would have to give her consent or this property could not be sold, and I communicated this to Mr. Closterhouse and we finally got her consent to the sale of the property on Webster avenue, and it was sold for $6,000. With reference to the relation of the Grand Rapids Trust Company and herself as to her homestead property, she said that property belonged to the Grand Rapids Trust Company; that they

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were paying her $200 a month and she had the privilege of living there until the property was sold, and that they must keep up the repairs on the property and pay her her money regularly each month."

He further testified that she telephoned to him about some repairs she wanted made and he took it up with the company and at its request he caused the repairs to be made. The plaintiff admitted that she approved a bill for putting electric lights in the house in October, 1917, and bills for repairs in August and November, 1918, and one for porch screens in September, 1919, and that these were all paid by the trust company.

Mr. Closterhouse testified:

"I was there a great many times during the summer of 1917. On the occasion of my looking the house over and talking with her about the homestead, Mrs. Torrent told me that Mr. Dunham had been her attorney; that she claimed she owned the house, but it had been put into the trust. She wanted the property all to go to her children, and she was then well and expected to live a few years, and she was perfectly satisfied under the conditions to have it sold or taken care of according to the terms of the trust deed. She told me she had lived in the finest house in Muskegon for a great many years and she would like to die there. We discussed with Mrs. Torrent the sale of this homestead. We received an offer from Mr. Emerson, our agent, saying that a number of business men representing a federation of social agencies desired a short time option on the property at the price of $35,000,—$10,000 down and the balance in deferred payments covering a matter of three or four or five years. I did not take that matter up with Mrs. Torrent, but we wrote a letter to all of the Torrent boys concerning the offer as to the sale of the homestead, to Lewis and John and Ray, the three spokesmen of the trust. I came to Muskegon on one of my trips and stopped in at the time the sale was being talked of and after we had written them. Mrs. Torrent felt that we would get a great deal more for the property

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than $35,000; that she would dislike very much to have the property sold at that price, and wouldn't be for it at all at a price of $35,000. She was opposed to the sale of $35,000."

Counsel for plaintiff stresses the fact that plaintiff received no adequate consideration for the conveyance of her individual property to the trustee; that the allowance of $200 per month was but a fair and reasonable amount in view of her interest in the estate as widow. It is his claim that plaintiff was then entitled to the homestead property worth $50,000, the 30 acres afterwards reconveyed to her, worth $5,000, and her interest in the estate, estimated at $34,536.68. The record does not contain a copy of the inventory or other proceedings in the probate court. The first annual account of the trust company as trustee under the trust deed shows that it received from the Michigan Trust Company moneys and property of the value of $133,610.04. This included real estate of the estimated value of $124,872. If the value of the stone house property, $50,000, and the thirty acres, $5,000, be deducted, the estate property would have been worth about $78,000 and plaintiff's interest, if a third, would have been about $26,000. As a consideration for her transfer of her interest as widow, with this estimation of its value, the provisions made for her in the trust deed would have been unusually large. It must be remembered that her right to the homestead property was in dispute. Mr. Torrent's will was made in 1908, ten years after the date of the deed from her to him. It appears from the terms of the will that he then considered he owned the stone house property. That she was tired of the litigation with her children over the estate of her husband is very apparent. She was advanced in years. It would cost a large sum to keep up the stone house and to pay taxes, insurance, etc., on it. A provision se-

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curing to her $200 per month and a comfortable home without expense, or $250 per month without such home, was not so unfair or unreasonable, in view of the facts stated and the further fact that the beneficiaries under the trust deed were her children or children's children, as to shock the conscience of a court of equity or indicate that her interests had not been carefully guarded when the trust deed was made.

Counsel for the defendants strongly urge that there is no evidence even tending to prove that the trust company or the defendants contesting her claim had any knowledge that she did not fully understand the terms of the trust when it was executed and that she is precluded, as to them, from making such claim. We do not find it necessary to consider this claim as in our opinion she has not maintained the burden of proof assumed by her to satisfy the court that she did not understand the terms of the written instrument admittedly executed by her. The trust deed must either stand or fall as a whole and, after a careful examination of the entire record, we feel constrained to hold that it should not be set aside. *Pierce* v. *Pierce,* 55 Mich. 629; *Dorrington* v. *Carpenter,* 171 Mich. 652; *Curtis* v. *Mueller,* 184 Mich. 148.

The decree is reversed and one may be entered here dismissing the bill of complaint, with costs to the trust company and the defendants Lange, Stever and Everington, payable out of the funds in the hands of the trust company.

FELLOWS, C. J., and WIEST, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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VHAY *v.* GIES.

DEEDS—CANCELLATION OF INSTRUMENTS—UNDUE INFLUENCE—EVIDENCE—SUFFICIENCY.

On a bill by children of the grantor, after his death, to set aside certain deeds on the ground of mental incompetency and undue influence, evidence of undue influence *held*, sufficient to justify the decree of the court below setting said deeds aside.

Appeal from Wayne; O'Brien (Patrick H.), J., presiding. Submitted February 1, 1922. (Docket No. 19.) Decided June 5, 1922.

Bill by Arthur J. Vhay and another against Anna Gies to set aside certain deeds. From a decree for plaintiffs, defendant appeals. Affirmed.

William Henry Gallagher, for plaintiffs.

Campbell, Dewey, Stanton & Bushnell, for defendant.

SHARPE, J. Plaintiffs are the children of John Vhay, who died in Detroit in September, 1920, aged about 75 years. This bill was filed by them to set aside two deeds executed by him on August 24 and August 30, 1920, respectively, conveying his home and certain other real estate to the defendant, on the grounds of the mental incompetency of and undue influence exercised over the grantor at the time of their execution. The answer was a denial of the allegations in the bill. By way of cross-bill the defendant prayed that the title to the premises be quieted in her. The trial court set aside the conveyances for the

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reasons stated and dismissed the cross-bill. The defendant appeals.

We do not deem it necessary to consider the question of the grantor's mental competency as in our opinion the proofs support the finding of undue influence. Mr. Vhay purchased a home in Detroit in 1900, using therefor in part certain moneys in his possession as guardian of the plaintiffs. He and his wife occupied it until her death in 1910. The plaintiffs were then married and in homes of their own. Mr. Vhay continued in occupancy, renting a part of the residence to roomers and light housekeepers. Defendant and her mother and sister became tenants in 1914. The mother was an invalid. The sister Mary remained at home with her mother. The defendant had a retail dry goods store on Grand River avenue. Her influence over Mr. Vhay soon became noticeable. After the mother's death, Mr. Vhay occupied a room adjoining that used by the two sisters. Many of the neighbors were called as witnesses and testified to facts tending to show the influence exercised by the defendant over Mr. Vhay. There is testimony clearly establishing that his neighbors and others, including the parish priest, were refused admission to the house on several occasions during the last weeks of his illness. He had long been a sufferer from Bright's disease, and was greatly weakened in body if not in mind. In February, 1920, he made a will, by the terms of which substantially all of his property was left to the defendant, who was present at the time it was prepared by her attorney. Some time later, defendant had procured an attorney to prepare a power of attorney from him to her and after it was executed she said "it might be better to make a deed," that "wills could be broken," and Mr. Vhay assented. He was very ill at the time the deeds in question were executed. The defendant raised his head from the

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pillow and supported him while he signed his name, saying to him, in substance, "You don't need to sign these papers unless you want to, but if you want to sign, this (referring to the blank line on the deeds) is the place to sign." An error was discovered in one of the deeds and another was brought for execution four days later. The attorney testified that when the first deed was executed she suggested selling out everything and further said,

"Never mind, father, we will be all right in a little while, and we will take that trip to California."

He further testified:

"Before the deed was signed, she said his children wouldn't come and see him, and in fact, she said that Mr. Vhay didn't want his children to come there, that she had instructions to keep them out of the house if they did come, and that was at the time the deeds were drawn. * * * There was never any occasion at all when he dissented from any proposal that she made or failed to comply with any suggestion that she made."

It appears that plaintiffs had demanded an accounting from their father for the moneys he had received as their guardian. Defendant insists that his action in making these deeds is thus explained. His relations to his children seem to have been friendly until defendant went to reside in his home. While much testimony was offered by defendant tending to prove his mental competency, we think there is little to rebut the proof of undue influence. By these deeds Mr. Vhay left himself practically penniless and a charge on the bounty of the defendant. We are impressed that the finding of the trial court, who saw and heard the witnesses, that these deeds—

"were signed and executed as a result of undue influence exerted upon him by the defendant in his weakened mental and physical condition,"

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—was justified by the proofs submitted. See, *In re Rosa's Estate*, 210 Mich. 628; *Power* v. *Palmer*, 214 Mich. 551.

The decree is affirmed, with costs to plaintiffs.

FELLOWS, C. J., and WIEST, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

MELCONIAN *v.* CITY OF GRAND RAPIDS.

1. MUNICIPAL CORPORATIONS—HIGHWAYS AND STREETS—RIGHT OF CITY TO CONTROL—RIGHTS OF COMMON CARRIERS.

   The streets of a city belong to the public, and for ordinary use and general transportation and traffic they are free and common to all, and any control sought to be exercised over them by the city must be such as will not defeat or seriously interfere with their enjoyment, but common carriers have no right to such use for private gain without the consent of the city.

2. SAME—REGULATION—DISTINCTION BETWEEN USE OF STREETS BY PUBLIC AND COMMON CARRIERS.

   The distinction between the use of streets by the public in the usual way for pleasure or business and as a place or instrumentality for business for private gain is fundamental, and while, as to the former, the power to regulate must be sparingly exercised and only when necessary in the public interest, as to the latter the right to use may be given or withheld.

3. SAME—CONSTITUTIONAL LAW—REGULATION MUST BE REASONABLE.

   The only restriction on the control which a city may

On validity of excise or license tax upon automobiles, see 37 L. R. A. (N. S.) 440; 52 L. R. A. (N. S.) 949; L. R. A. 1915D, 322.

As to whether person or company operating passenger automobile is a common carrier, see note in L. R. A. 1918F, 468.

On power of municipalities to license and regulate vehicles operating upon streets, see note in 45 L. R. A. (N. S.) 1153.

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exercise over its streets under the constitutional provision (Art. 8, § 26) is that it must be reasonable.

4. SAME—LICENSE—REGULATION AFFECTING PRIVATE RIGHTS MAY NOT BE ARBITRARY—EXERCISE OF POLICE POWER DISCRETIONARY.

While the authority to grant a license must be conferred upon some person, body, or commission, when the regulation affects private rights, it is a general rule that the requirements for obtaining a license must be so specifically pointed out in the ordinance as to permit all applicants who comply therewith to secure a license as a matter of right, and that an arbitrary discretion to grant or refuse may not be conferred, but in cases where the public health or safety is involved, this rule has been relaxed and a provision conferring discretionary power has been sustained.

5. SAME—ORDINANCES—VALIDITY—REGULATION OF TAXICABS—CONSTITUTIONAL LAW.

The provisions in section 2 of an ordinance of the city of Grand Rapids regulating the operation of taxicabs in said city, making it unlawful to operate a taxicab on the streets of the city without first obtaining a license to do so, requiring applications on a form provided by the city clerk containing certain information, providing that all applications should be investigated by the city manager who should report same to the city commission with his recommendation, and "if in the opinion of the city commission the person making the application is a proper person, both by experience and character, they may authorize the granting of a license," etc., *held*, within the power conferred on the city under Article 8, § 28, of the Constitution, and therefore valid.

6. SAME.

Section 4 of said ordinance providing for the granting of permits to drivers of such licensed taxicabs, *held*, valid.

7. SAME—PROVISIONS OF ORDINANCE—DISCRETION—INFERENCES.

The criticism of counsel that section 2 does not provide that the information secured by the city manager shall be communicated by him to the commission is overtechnical, since the reference of the application to him is for the very purpose of securing information on which the commission may act, it being necessary for the exercise of a wise discretion, and it cannot be doubted that

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the commission would require him to lay before it the information on which his recommendation is based, and, therefore, it may fairly be said that he is required to do so.

8. SAME — LICENSE FEE — REASONABLENESS — REGULATION—TAXATION.

The provision in section 3 fixing the annual license fees at $25 for the first taxicab and $10 for each other is not open to the objection that said fees are so large as to be unjust, unreasonable, and discriminatory, and that they are for the purpose of revenue rather than for the purpose of regulation, since the fees may include cost of issuing license, inspection, expense incident to reasonable supervision, and also any other cost the city may be subjected to by reason of the use of the streets for the purpose permitted.

9. SAME—PROVISION AS TO TRANSPORTING LIQUOR VOID—INTENT.

The intent to limit to the owner or driver of the taxicab the provision in subsection *b* of section 5, making it unlawful for any person "to procure or transport or to aid or abet in the procuring or transporting of any intoxicating liquor," *held*, not so clearly expressed as to permit its enforcement as a penal provision.

10. SAME—PROVISION AS TO WOMEN IN TAXICAB VOID—PRIVATE RIGHTS.

The provision in subsection *c* of section 5, making it unlawful "to allow women in any taxicab while the same is at any stand or upon any street waiting for customers," *held*, so clearly an invasion of private rights as to render it void.

11. SAME—PROVISION FOR INDEMNITY BOND VALID.

The requirement of an indemnity bond of $5,000, under subsection *f* of section 5, *held*, within the power of the city authorities.

12. SAME — PROVISION FOR PUNISHMENT FOR REFUSAL TO PAY FARE VOID—CONSTITUTIONAL LAW—IMPRISONMENT FOR DEBT.

Section 14, providing for the punishment of any person refusing to pay his fare after having received the service, not being limited to cases of fraud or breach of trust within the exception in article 2, § 20, of the Constitution, prohibiting imprisonment for debt, is in conflict therewith, and therefore void.

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13. SAME — PENALTY NOT UNREASONABLE — IMPOSITION OF COSTS VOID—STATUTES.

The maximum penalty provided in section 18 for violations of the ordinance, viz., $500 fine and imprisonment in the county jail not to exceed 90 days, is within the limit permitted by the statute (1 Comp. Laws 1915, § 3307, subd. *e*), and is not open to the objection that it is unreasonable; but the imposition of costs of prosecution is unauthorized by said statute and is therefore void.

14. SAME—CONSTITUTIONAL LAW—CONSTITUTIONAL PROVISIONS AS TO TITLE OF STATUTE NOT APPLICABLE TO ORDINANCES.

The objection that the title of the ordinance is defective because the provision of a penalty for its violation contained in section 18 is not included therein, is not tenable, the constitutional provisions relating to the title of laws passed by the legislature having no application to ordinances enacted by the common council of a city.

15. SAME — INVALIDITY OF SEPARABLE PARTS OF ORDINANCE DOES NOT RENDER WHOLE INVALID.

The sections or parts of sections of the ordinance which are herein held invalid, being distinctly separable, the remainder, which constitute in themselves a complete enactment, are valid and enforceable.

Appeal from superior court of Grand Rapids; Dunham (Major L.), J. Submitted January 30, 1922. (Docket No. 124.) Decided June 5, 1922.

Bill by Harry Melconian and others against the city of Grand Rapids to enjoin the enforcement of an ordinance. From a decree for plaintiffs, defendant appeals. Reversed, and bill dismissed.

Shelby B. Schurtz, for plaintiffs.

Ganson Taggart, for defendant.

SHARPE, J. On August 22, 1921, the city of Grand Rapids adopted an ordinance "Providing for and Regulating the Operation of Taxicabs" in that city. The plaintiffs, who "are persons operating motor vehicles

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for hire," seek to restrain its enforcement by injunction. In section 1, the word "taxicab" is defined to "mean and include any motor vehicle engaged in the business of carrying persons for hire." Section 2 makes it unlawful to operate a taxicab on the streets of the city without first obtaining a license to do so. An application for a license on a form provided must be filed with the city clerk. Certain information regarding the applicant and the type of car must be set forth therein. It is provided that the city clerk shall refer all applications to the city manager—

"who shall cause an investigation to be made of the fitness of the applicant as to character and ability, and shall transmit the application with his recommendation to the city commission. If in the opinion of the city commission the person making the application is a proper person, both by experience and character, they may authorize the granting of a license," etc.

Section 4 contains somewhat similar provisions regarding the granting of permits to drivers of such vehicles. These sections are claimed to be invalid because they attempt "to confer upon the city commission, the arbitrary power to grant or refuse a license according to its whim or caprice." The trial court sustained this claim and his decree declaring the ordinance void was largely based thereon.

The apparent confusion in the authorities is, in part at least, due to a lack of consideration of the subject-matter sought to be controlled and the source of such control. There are many occupations and kinds of business which, under the police power and the authority delegated by the legislature, may be regulated by the city authorities. Such regulation is permitted in the interest of the public peace, health, morals and general welfare of the city. While an individual has an inherent or natural right to engage in any lawful business on his own property, yet the nature of

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the business sought to be carried on may be such as to render it subject to regulatory control. Ordinances regulating slaughter houses, pawnbrokers, junk dealers, livery stables, pool rooms, places where articles of food liable to infection are kept for sale, and the like, have been sustained as a valid exercise of such power. Nuisances may also be abated. As to some of these, the power must be cautiously and sparingly exercised. As to others, there exists a greater control. As to still others, the business may be suppressed or prohibited, wholly or conditionally, as the particular facts may justify. Further discussion of this power seems unnecessary as the rules of law governing it seem well established. It is sufficient to say that the regulation must be reasonable, without discrimination, and fair to all alike.

The subject-matter of the ordinance here considered is the use of the public streets. Section 28 of article 8 of our State Constitution reads as follows:

"No person, partnership, association or corporation operating a public utility shall have the right to the use of the highways, streets, alleys or other public places of any city, village or township for wires, poles, pipes, tracks or conduits, without the consent of the duly constituted authorities of such city, village or township; nor to transact a local business therein without first obtaining a franchise therefor from such city, village or township. The right of all cities, villages and townships to the reasonable control of their streets, alleys and public places is hereby reserved to such cities, villages and townships."

The power conferred upon a city by this section was considered by this court in *People* v. *McGraw*, 184 Mich. 233, and in *Brennan* v. *Recorder of Detroit*, 207 Mich. 35. In the former case it was said:

"By giving the language of the whole section its ordinary and natural meaning, public utilities were placed under control of the local authorities, and the local authorities may control within reason the use of

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their streets for any purposes whatsoever not inconsistent with the State law."

It was also held that any attempt on the part of the State legislature to take away from cities such reasonable control was unconstitutional and void.

Taxicabs as defined in the ordinance are common carriers. Mr. Thompson, in his work on Carriers of Passengers, page 26, note 1, says:

"A common carrier of passengers is one who undertakes for hire to carry all persons indifferently who may apply for passage. To constitute one a common carrier it is necessary that he should hold himself out as such. This may be done not only by advertising, but by actually engaging in the business and pursuing the occupation as an employment."

A public moving van was held to be a common carrier in *Lawson* v. *Judge of Recorder's Court,* 175 Mich. 375 (45 L. R. A. [N. S.] 1152), and in *Terminal Taxicab Co.* v. *Kutz,* 241 U. S. 252 (36 Sup. Ct. 583; Ann. Cas. 1916D, 765). One who holds himself out as a cartman, drayman or truckman, ready to carry goods for hire for all who may wish to employ him, was held to be a common carrier in *Lloyd* v. *Haugh,* 223 Pa. 148 (72 Atl. 516, 21 L. R. A. [N. S.] 188).

"A taxicab company following the business of transporting persons for hire and holding itself out to carry one and all is a common carrier of passengers, and is subject to all the liabilities of such a carrier." Syllabus, *Van Hoeffen* v. *Columbia Taxicab Co.,* 179 Mo. App. 591 (162 S. W. 694).

The authorities are collected and discussed at length in *Cushing* v. *White,* 101 Wash. 172 (172 Pac. 229, L. R. A. 1918F, 463), and note to the latter.

The streets of the city belong to the public. For ordinary use and general transportation and traffic, they are free and common to all, and any control sought to be exercised over them must be such as will

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not defeat or seriously interfere with their enjoyment. The plaintiffs, however, as common carriers have no right to such use for private gain without the consent of the city. Their use is accorded as a mere privilege, and not as a matter of inherent or natural right. *City of Memphis* v. *State*, 133 Tenn. 83 (179 S. W. 631, L. R. A. 1916B, 1151, P. U. R. 1916A, 825, Ann. Cas. 1917C, 1056); *Desser* v. *City of Wichita*, 96 Kan. 820 (153 Pac. 1194, L. R. A. 1916D, 246); *Greene* v. *City of San Antonio* (Tex. Civ. App.), 178 S. W. 6; *Hadfield* v. *Lundin*, 98 Wash. 657 (168 Pac. 516, L. R. A. 1918B, 909, Ann. Cas. 1918C, 942); *Ex parte Dickey*, 76 W. Va. 576 (P. U. R. 1915E, 93, 85 S. E. 781, L. R. A. 1916F, 840); *In re Hoffert*, 34 S. D. 271 (148 N. W. 20, 52 L. R. A. [N. S.] 949); *Huston* v. *City of Des Moines*, 176 Iowa, 455 (156 N. W. 883).

The distinction between the use by the public in the usual way for pleasure or business and as a place or instrumentality for business for private gain is fundamental. While as to the former the power to regulate must be sparingly exercised and only when necessary in the public interest, as to the latter the right to use may be given or withheld. This distinction is made clearly apparent when the decision in *Matter of Frazee*, 63 Mich. 396 (6 Am. St. Rep. 310), on which plaintiffs strongly rely, is read in connection with *Love* v. *Judge of Recorder's Court*, 128 Mich. 545 (55 L. R. A. 618). In the *Frazee Case*, the right to the use of the streets for the purpose of a parade was in question. This was said to be a natural or inherent right, subject only to reasonable regulation, and it was held that the by-law which left "the power of permitting or restraining processions, and their courses, to an unregulated official discretion" was invalid. The *Love Case* involved an ordinance prohibiting the use of the streets or public places for the

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purposes of public addresses "except in accordance with a permit from the mayor, such permit to designate the time and place" when an address might be made. The *Frazee Case* was relied on as controlling. The ordinance was held to be valid and the distinction here sought to be made between permissive use and use as a matter of right was pointed out.

The only restriction on the control which the city may exercise over its streets under the constitutional provision is that it must be reasonable. The authority to grant a license must be conferred upon some person, body or commission. When the regulation affects private rights, it is held as a general rule that the requirements for obtaining a license must be so specifically pointed out in the ordinance as to permit all applicants who comply therewith to secure a license as a matter of right and that an arbitrary discretion to grant or refuse may not be conferred. In cases where the public health or safety is involved, this rule has been relaxed and a provision conferring discretionary power has been sustained. *Lieberman* v. *Van De Carr,* 199 U. S. 552 (26 Sup. Ct. 144), and *Fischer* v. *City of St. Louis,* 194 U. S. 361 (24 Sup. Ct. 673). In the former, an ordinance providing that—

"No milk shall be received, held, kept, either for sale or delivered in the city of New York, without a permit in writing from the board of health,"

was attacked because it conferred "absolute and despotic power to grant or withhold permits to milk dealers." It was held that these were questions which arise in the administration of the law but do not affect its validity and that an arbitrary exercise of the discretionary power conferred was subject to review by courts in a proper proceeding. In the *Fischer Case,* the ordinance regulated the keeping of cow stables and dairies within the city limits. The court said:

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"It would be exceedingly difficult to make exceptions in the ordinance itself without doing injustice in individual cases, and we see no difficulty in vesting in some body of men, presumed to be acquainted with the business and its conditions, the power to grant permits in special cases."

In *City of Grand Rapids* v. *Braudy*, 105 Mich. 670 (32 L. R. A. 116, 55 Am. St. Rep. 472), an ordinance regulating junk dealers which conferred discretionary power on the common council to grant or refuse a license was held valid. It was said:

"Courts cannot interfere with legislative discretion, and are slow to declare ordinances invalid because unreasonable, when the power to legislate upon the subject has been conferred upon the common council. The council's discretion, and not the court's, must control. In such matters the city authorities are usually better judges than the courts."

Where, however, the subject-matter sought to be controlled is one to which an applicant has a permissive right only, many courts have gone far in holding that the validity of the provisions under which such right may be attained cannot be questioned. *Davis* v. *Massachusetts*, 167 U. S. 43 (17 Sup. Ct. 731); *Hadfield* v. *Lundin, supra; State* v. *Mayo*, 106 Me. 62 (75 Atl. 295, 26 L. R. A. [N. S.] 502, 20 Ann. Cas. 512). (See quotation from the *Davis Case* in *Love* v. *Judge of Recorder's Court, supra.*)

The provisions in sections 2 and 4 are, we think, well within the power conferred on the city under the constitutional provision. The criticism of counsel that section 2 does not provide that the information secured by the city manager shall be communicated by him to the commission is over-technical. The manager is the servant of the commission. The reference of the application to him is for the very purpose of securing information on which the commission may act. It cannot be doubted that the commission could require

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him to lay before it the information on which his recommendation is based and we think it may fairly be said that the provision requires him to do so. The nature of the business licensed is such that its reasonable control necessitates the exercise of a wise discretion in deciding who shall be permitted to engage in it. The dangers incident to the use of the streets by automobiles for pleasure or business, if driven carelessly, have been many times pointed out by this court. *Colborne* v. *Railway,* 177 Mich. 139, 149; *Patterson* v. *Wagner,* 204 Mich. 593, 600. Such dangers and the inconvenience to traffic from taxicabs are even greater than from electric cars, which are confined to well-defined courses and move on metal rails. Provisions in the State law and municipal ordinances containing safety regulations have been upheld. *People* v. *Dow,* 155 Mich. 115; *People* v. *McGraw, supra*; *Daugherty* v. *Thomas,* 174 Mich. 371 (45 L. R. A. [N. S.] 699, Ann. Cas. 1915A, 1163). These regulations, applying as they do to persons using the streets as a matter of right, are general in their nature and apply to all alike.

Here, however, the plaintiffs seek to use the streets as a place in which to carry on a private business for personal gain. Their right to do so may be granted upon considerations outlined in the form of the questions to be answered in the application blank and may be made dependent upon their answers thereto and the information secured as to their character, fitness or other determining facts. Should the number of applications exceed the reasonable demands of the city for such service, the power to limit must be vested somewhere. Such demands may so vary from time to time, dependent upon the growth of the city, the use or non-use of the streets by street car lines and other considerations, that it would be impractical to express such limitations in an ordinance. The de-

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termination of such questions must be left to some agency of the city. And, as was said by Mr. Justice MOORE in the *Love Case* (applying the language to the commission):

"Under such circumstances, what can be more reasonable than to lodge the power of deciding when and where one may occupy this public space in one having sufficient intelligence and so possessing the confidence of his fellow citizens that they have placed him at the head of the municipal government?"

In *Huston* v. *City of Des Moines, supra*, the ordinance in question contained a provision quite similar to that in section 2. It provided for the form of the application and that when presented to the city clerk he should refer it to the superintendent of public safety, "who, at the next regular meeting of the council * * * shall present the same to the council with his recommendation thereon," and that the council might grant the application as presented, or grant it with modifications, or deny it. The discretion imposed was held to be within the power conferred. In *Ex parte Dickey, supra*, the validity of an ordinance regulating "jitney busses" was in question. The court very carefully distinguishes between vocations which do not involve the use of public property and those requiring the use of the public streets. It is said:

"But when a citizen claims a private right in public property, such as a street or park, a different situation is presented. * * * Such rights are in the nature of concessions by the public, wherefore the legislature may give or withhold them at its pleasure. It may give them for some purposes and withhold them for others and, in the case of those given, it may upon considerations of character, quality and circumstances, discriminate, permitting some things of a general class or nature to be done and refusing to permit others of the same general class to be done, or extending the privilege to some persons and denying it to others because of differences of character or capacity."

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The cases relied on by the trial court (*Devereaux* v. *Genesee Township Board,* 211 Mich. 38; *City of Portland* v. *Traynor,* 94 Or. 418 [183 Pac. 933, 6 A. L. R. 1410]; *Makris* v. *Superior Court,* 113 Wash. 296 [193 Pac. 845, 12 A. L. R. 1428]; *State* v. *Mahner,* 43 La. Ann. 496 [9 South. 480]; *County of Los Angeles* v. *Hollywood Cemetery Ass'n,* 124 Cal. 344 [57 Pac. 153, 71 Am. St. Rep. 75]; *Yick Wo* v. *Hopkins,* 118 U. S. 356 [6 Sup. Ct. 1064]; *City of Seattle* v. *Gibson,* 96 Wash. 425 [165 Pac. 109]; *Garrabad* v. *Dering,* 84 Wis. 585 [54 N. W. 1104, 19 L. R. A. 858, 36 Am. St. Rep. 948]), are not, in our opinion, controlling. The ordinances there considered were all regulatory of the classes of business which may be engaged in as a matter of right, to which, as already stated, a different rule applies. The *Devereaux Case* involved an ordinance providing for the issuing of permits "to public billiard and pool rooms, dance halls, bowling alleys and soft drink emporiums;" in the *Traynor Case* the subject of attempted regulation was "a food establishment or soft drink establishment;" the *Makris Case* involved the regulation of the sale of candy and soft drinks; in the *Mahner Case* it was sought to regulate certain dairies within the limits of the city; the *Hollywood Case* involved the right to establish cemeteries without the consent of the boards of supervisors; the *Yick Wo Case,* the regulation of laundries; the *Garrabad Case* was similar to *Matter of Frazee, supra;* and the *Seattle Case* reviewed an ordinance for the licensing of druggists.

Two other cases specially relied on by plaintiffs are *Smith* v. *Hosford,* 106 Kan. 363 (187 Pac. 685), and *Cicero Lumber Co.* v. *Town of Cicero,* 176 Ill. 9 (51 N. E. 758, 42 L. R. A. 696, 68 Am. St. Rep. 155). The *Smith Case* involved the grant of a permit to

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build a garage, the *Cicero Case* a prohibition to use certain streets by certain classes of vehicles.

In the annotation following *Makris* v. *Superior Court*, 12 A. L. R. 1435, the writer says:

"The validity of the grant of discretion depends largely upon the nature of the business or thing with respect to which it is to be exercised, and as to whether or not the proper regulation and control thereof require that a discretion be vested in one or more public officials in order properly to control the conduct of the business, or the use, etc., of the article or thing in question.

"It should also be remembered that the fact that a court has laid down one rule in one case, as, for instance, than a municipal ordinance granting arbitrary and uncontrolled discretion to city officials as to the granting of licenses or permits to carry on what is generally regarded as a useful and ordinarily lawful business is invalid does not necessarily preclude the reaching of a contrary conclusion as to the validity of a grant of arbitrary power with respect to the licensing of a business such as dealing in intoxicating liquors, the right to carry on which is generally regarded as a mere privilege, subject to arbitrary control or absolute prohibition."

Section 3 provides for an annual license fee of $25 for the first taxicab and $10 for each other. These are said to be "unjust, unreasonable and discriminatory;" that they "are not for the purpose of regulation, but are for the purpose of revenue." Such fees may include the cost of issuing the license, the cost of inspection and any expense incident to a reasonable supervision of the use of the streets by taxicabs. In fixing them, consideration may also be given to any consequences likely to subject the city to cost by reason of their use for the purpose permitted. We agree with the trial court that the fees fixed are not so large as to be subject to the objections stated. *Vernor* v. *Secretary of State*, 179 Mich. 157 (Ann. Cas. 1915D,

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128); *City of Grand Rapids* v. *Braudy, supra; People* v. *Grant,* 157 Mich. 24, and cases cited; *Huston* v. *City of Des Moines, supra.*

Subsection (*b*) of section 5 makes it unlawful for any person "To procure or transport or to aid or abet in the procuring or transporting of any intoxicating liquor." It was doubtless the intention to limit this provision to the owner or driver of the taxicab, but such intent is not so clearly expressed as to permit its enforcement as a penal provision.

Subsection (*c*) of this section makes it unlawful:

"To allow any taxicab to be used for immoral purposes, or to procure or aid in procuring any woman or women for immoral purposes, or to allow women in any taxicab while the same is at any stand or upon any street waiting for customers."

The latter part of this subsection is so clearly an invasion of private rights that it cannot stand.

Subsection (*f*) of this section provides for the furnishing of an indemnity bond in the sum of $5,000. Such requirement is clearly within the power of the city authorities. *City of Grand Rapids* v. *Braudy, supra.*

Section 14 provides for the punishment of any person refusing to pay his fare after having received the service. This is clearly in violation of section 20, article 2, of the Constitution, which reads, in part, as follows:

"No person shall be imprisoned for debt arising out of, or founded on contract, express or implied, *except in cases of fraud or breach of trust.*" * * *

The provision does not attempt to limit the punishment to the exception which we have italicized. This the legislature very carefully did in the act for the protection of hotel keepers (2 Comp. Laws 1915, § 6966). This section may not be enforced.

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Section 18 provides that violations of the ordinance shall be deemed misdemeanors and may be punished by "a fine not to exceed $500 and costs of prosecution or imprisonment in the common jail of Kent county for a period of not more than ninety days, or both," in the discretion of the court. The maximum fine and punishment provided for is said to be unreasonable. We do not think so. It is within the limit permitted by the statute. 1 Comp. Laws 1915, § 3307, subd. *e*. There is no presumption that an unreasonable penalty will be imposed for a violation of any of the provisions of the ordinance. Individual cases may be disposed of as they arise. It is said that the provision as to costs is unauthorized under the statute. While the power herein exercised by the city flows from the Constitution, and not from the statute, we feel constrained to agree with counsel for plaintiffs that costs may not be imposed. The statute does not permit it and the Constitution merely provides for reasonable control. We think the statute determinative of the penalty which may be imposed under the ordinance.

The title is attacked because the provision for a penalty contained in section 18 is not included in it. In *People* v. *Wagner*, 86 Mich. 594, 597 (13 L. R. A. 286, 24 Am. St. Rep. 141), it was held—

"that the constitutional provisions relating to the title of laws passed by the legislature do not apply to ordinances enacted by a common council of a city."

We think the title sufficient. See 28 Cyc. p. 378.

Except as herein pointed out, we think the provisions of the ordinance are valid and enforceable. The sections or parts of sections which are invalid are distinctly separable from the remainder. Those held valid constitute in themselves a complete enactment, and may be enforced. *City of Detroit* v. *Railway Co.*, 95 Mich. 456 (20 L. R. A. 79, 35 Am. St. Rep.

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580); *People* v. *Armstrong*, 73 Mich. 288 (2 L. R. A. 721, 16 Am. St. Rep. 578); 28 Cyc. p. 372.

The following cases in which ordinances containing somewhat similar provisions were considered will be found instructive: *Ex parte Counts*, 39 Nev. 61 (153 Pac. 93); *Hazelton* v. *City of Atlanta*, 147 Ga. 207 (93 S. E. 202); *Hadfield* v. *Lundin, supra; Commonwealth* v. *Slocum*, 230 Mass. 180 (119 N. E. 687); *City of Memphis* v. *State, supra; Ex parte Cardinal*, 170 Cal. 519 (150 Pac. 348, L. R. A. 1915F, 850); *State* v. *Howell*, 85 Wash. 294 (147 Pac. 1159, Ann. Cas. 1916A, 1231); *Greene* v. *City of San Antonio, supra; Ex parte Dickey, supra; Auto Transit Co.* v. *City of Fort Worth* (Tex. Civ. App.), 182 S. W. 685; *Wilson* v. *Eureka City*, 173 U. S. 32 (19 Sup. Ct. 317); *Mehlos* v. *City of Milwaukee*, 156 Wis. 591 (146 N. W. 882, 51 L. R. A. [N. S.] 1009, Ann. Cas. 1915C, 1102).

The decree rendered is reversed and set aside and the bill of complaint dismissed, but without costs.

FELLOWS, C. J., and CLARK, BIRD, MOORE, and STEERE, JJ., concurred. WIEST, J., concurred in the result.

The late Justice STONE took no part in this decision.

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CITY OF GRAND RAPIDS *v.* CONSUMERS POWER CO.

1. ELECTRICITY—ORDINANCES—RATES ADVERTISED BY COMPANY NOT CONTROLLING.

Where the common council of the city of Grand Rapids passed an ordinance for the regulation of an electric light and power company, which was ratified by the electors and accepted by the company, the rates provided therein are controlling rather than the rates published in the newspapers by the company prior to the vote on said ordinance by the electors; there being no reference in the ballots which were voted to the advertisements which appeared in the papers.

2. SAME—WAIVER OF RIGHT TO CHARGE RATES PROVIDED IN ORDINANCE.

The electric light and power company, by putting into effect the rates as advertised by it, and continuing same for many years, did not waive its right to at any time, within the life of the ordinance, charge the maximum rates authorized therein, although higher than the rates as so advertised.

Appeal from superior court of Grand Rapids (Dunham, Major L.), J. Submitted January 18, 1922. (Docket No. 101.) Decided June 5, 1922.

Bill by the city of Grand Rapids against the Consumers Power Company to enjoin the charging and collecting of certain rates. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Ganson Taggart, for plaintiff.

George Mechem, for defendant.

MOORE, J. The chancellor who heard this case in the court below filed a carefully prepared written opinion, from which we quote freely as follows:

On right to raise rates of public service corporation fixed by franchise, see note in L. R. A. 1915C, 287.

On power of municipality apart from contract to regulate the rates to be charged by public service corporations, see notes in 33 L. R. A. (N. S.) 759; 43 L. R. A. (N. S.) 994.

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"This is an action brought by the plaintiff to restrain defendant from charging and collecting rates as provided in an ordinance of this city adopted by the common council thereof on July 29, 1907, entitled as follows:

"'An ordinance to regulate and control the exercise by the Grand Rapids-Muskegon Power Company in the streets and public places of the city of Grand Rapids of the franchise of transmitting and distributing electricity for light, heat and power as provided by section 7, title 4 of the charter of said city and to approve of the location and designation in such streets and public places of the lines of conduits, poles, wires and other conductors and appliances necessary therefor.'

"Defendant claims this ordinance authorizes such charges. The facts upon which each party hereto bases its claim are substantially as follows:

"The Grand Rapids-Muskegon Power Company, mentioned in said ordinance, acquired its corporate franchise under the laws of the State of Maine on November 12, 1904, and was admitted to do business in this city under Act No. 206 of the Public Acts of this State for the year 1901 on December 19th of that year. Between its authorization to do business in this city, and the year 1907 it had expended large sums of money to enable it to produce and supply electricity for the purpose of light, heat and power and including construction of lines for the transmission of the same.

"On March 18, 1907, the Muskegon Power Company took up the matter of obtaining a franchise from plaintiff to do business in this city and sent a communication to that effect by its vice-president, W. A. Foote. * * * Such negotiations were had between said power company and said common council that the ordinance in question was introduced in said common council on July 15, 1907, and adopted as it now reads on July 29, 1907. It was duly accepted by said power company on August 5, 1907. Thereafter a petition was filed to submit said ordinance to referendum under section 2, title 4 of said city charter. In compliance therewith said council submitted said question at an election held on the 17th day of September, 1907. * * * The result was 5,157 votes in its favor and 3,470 against it. After the canvass of this

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vote said common council declared said ordinance adopted. * * *

"On August 17, 1907, said Grand Rapids-Muskegon Power Company caused to be published in the several papers in said city the following advertisement:

"'Grand Rapids Press, Saturday, August 17, 1907.

"'Electric Light and Power. The following reduced rates to take effect October 1, 1907. Reduced schedule of rates for light and power to take effect October 1, 1907.

"'Lighting. * * * Power * * *

"'A minimum charge of $1 per month will be made to each individual power customer. Ten per cent. will be added to all light and power bills not paid by the 15th of the month following.

"'GRAND RAPIDS-MUSKEGON POWER COMPANY.

"'GRAND RAPIDS-EDISON COMPANY.'

"The Muskegon and Edison companies signed this advertisement and both accepted the ordinance, and subsequently all rights in and property of these utility companies were acquired by defendant. * * *

"In November, 1908, defendant put into effect certain rates to new customers, different from those stated above as shown in said advertisement, but which rates were less than those that defendant was authorized to charge in said ordinance of July 29th, as to new customers. These rates were continued in effect until sometime in 1910 when complaint was made by certain city officials claiming an unjust discrimination between the old and new consumers of electricity, and by reason of such complaint defendant discontinued such discriminatory rates and put all consumers on the rates as advertised in August, 1907, and as set out above. * * *

"From October 1, 1907, until December, 1920, the advertised rates continued to be the uniform rates charged by the defendant to its customers, with the exception of said discriminatory rates above mentioned, and whatever other charge was made in excess thereof, if any, between November, 1918, and January 20, 1919. It does not clearly appear by either the pleadings or proof in the case what such increased rates were, if any. It does appear, however, that on November 29, 1918, defendant notified the city commission that it desired to increase the rates charged as follows: 8 cts. per K. W. for the first 60 hours use

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of connected load, 6 cts. per K. W. for the next 60 hours use of connected load, and 4 cts. per K. W. for all current used thereafter. Plaintiff at that time denied defendant the right to charge any amount in excess of said published rates, and defendant then withdrew its claim for such increased rates and such notice from plaintiff was to the further effect that if defendant did not withdraw its increased rates that the city commission would reduce the rate of fare charged on the Grand Rapids street railway, and plaintiff claims that any excess collected by defendant at the rates last above stated were refunded to the persons, firms, or corporations paying such increased rates over said advertised rates of 1907. Plaintiff claims and defendant admits that on more than one occasion defendant has received notice from said city commission that it could not raise rates without the consent of such commission.

"About July 15, 1920, defendant presented a communication to said city commission asking authority to make a temporary increase in rates, a copy of which communication is attached to defendant's answer marked Exhibit D, but is too long to include here. In compliance with such communication, this application was referred to Fred H. Locke, city manager, and George E. Ellis, commissioner, as a special committee who reported at the meeting of said commission held September 9, 1920, in effect that a temporary increase in defendant's rates should be permitted and that an ordinance be drafted to that effect and in conformity with such report. On September 16, 1920, an ordinance was reported purporting to fix rates of increase as shown by such ordinance." * * *

The defendant declined to accept this ordinance. We again quote:

"This ordinance was then amended by the said city commission so that section 2 reads as follows:

"'This ordinance is an emergency measure subject to revocation at any time by the city commission and the consent, permission and authority hereby given and granted shall continue only so long as this ordinance shall remain unrevoked and in force.'

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"Section 4 was stricken out and section 5 was made section 4 and amended to read as follows:

"'The rights contained in this ordinance shall under no circumstances be construed as extending the life of the original franchise grant under which said company is now operating, but as expressly recognizing the said franchise and the several conditions therein contained other than as herein expressly modified.'

"With a few other slight and unimportant changes the ordinance was adopted by said city commission on November 4, 1920, and was thereafter accepted by and acted upon by the said defendant. * * *

"The main question in this case is whether, under the above state of facts, defendant is bound until the expiration of its charter in 1927 by the rates advertised by the Grand Rapids-Muskegon Power Company on August 17, 1907, in the Grand Rapids Press, which were by the advertisement to take effect on October 1, 1907, and fully set out in paragraph 6 of plaintiff's bill.

"Was the ordinance of July 29, 1907, a franchise, or was it an ordinance regulating the use of the franchise acquired by said Muskegon Power Company under and by virtue of Act No. 264 of the Public Acts of this State for the year 1905?

"This power company as already stated, received its corporate franchise under the laws of the State of Maine on November 12, 1904, authorizing it to manufacture, sell and distribute electrical current for lighting and power purposes. By complying with Act No. 206 of the Public Acts of 1901 of this State the Muskegon Power Company was authorized to conduct its business in the city and elsewhere of distributing its electrical current, and it was so lawfully engaged in this city on July 15, 1907, and prior and subsequent thereto. The Muskegon Power Company in 1907 was not dependent upon authority from the common council of the city of Grand Rapids for the right to use its streets for the purpose of promoting and carrying on its public utility, that of furnishing electricity. This right said power company had acquired from the State in 1905. Plaintiff could not have prevented the use of such streets by said power company if it had

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desired so to do. This right on the part of the Muskegon Power Company by said Act No. 264 was restricted in its use of said streets so as not to injuriously interfere with other public uses thereof, and the further restriction that the city had the power to make all reasonable rules for the location of all lines of poles and wires for the distribution of such electrical current. Further than this, plaintiff had no authority to interfere with the defendant in the exercise of its utility.

"Plaintiff, with the intention of exercising its right under said Act No. 264 adopted the ordinance of July 29, 1907. I do not think that it is at all important to determine whether this ordinance is a primary or secondary franchise, or whether it is a franchise at all in the strict construction of that term. The creation of the corporation, the Grand Rapids-Muskegon Power Company, was a franchise. It was purely the creature of the statute, and such rights as were given it by the ordinance just mentioned, so far as placing poles, etc., are concerned as additional rights are often called 'franchises,' but perhaps should more properly be termed 'powers.'

"The only significance, if any, in determining whether the ordinance of July 29, 1907, is a franchise or a regulatory ordinance is by reason of section 2 of title 4 of the city charter, in force at the time said ordinance was adopted, reading as follows:

"'No franchise, whether an original grant, extension or amendment, shall become operative, where a petition is filed with the city clerk within 30 days after the first publication of the ordinance granting the same, signed by not less than 12 per cent. of the qualified voters of the city as shown by the vote at the last preceding general city election asking for submission of the question of granting such franchise to popular vote, until such franchise shall be so submitted at a regular election or special election called for that purpose and approved by a majority of the electors voting thereon.

"'No grantee of a franchise or a privilege shall be entitled to assign or sublet the same or allow any other to use the same without the consent of the city by ordinance duly passed which ordinance shall be subject to the referendum provided for in this paragraph.'

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"Defendant contends that the said ordinance of July 29th is not a franchise entitling a referendum thereon. Plaintiff claims it is.

"Act No. 264 of the Public Acts of 1905 contains this language:

"'The designation and location of all lines of poles and wires shall be subject to the regulation, direction and approval of the common council of cities,' etc.

"After the adoption of said ordinance and within the time mentioned in said section 2, title 4 of said city charter, a petition was filed with the city clerk signed by more than 12 per cent. of the qualified voters of said city as shown by the vote at the last preceding general election, asking for the submission of the granting of such franchise at a popular vote. Assuming now that said ordinance was a franchise within the meaning of said section 2, of title 4, the said ordinance of July 29, 1907, was not operative until the votes of September 17, 1907, on said referendum was canvassed declaring said ordinance approved, nor until 42 days after its adoption and first publication thereof, nor unless accepted by both companies within said 42 days.

"The language of section 2 is that:

"'No franchise, etc., shall become operative until approved by a majority of the electors voting thereon.'

"The form of ballot that was used by the voters on this referendum was as follows:

"'Shall an ordinance to regulate and control the exercise of the Grand Rapids-Muskegon Power Company in the streets and public places of the city of Grand Rapids * * * passed by the common council on the 29th day of July, 1907, be approved?'

"The referendum related to the ordinance of July 29, 1907, only. It was so stated upon the face of the ballot.

"I have already stated the title of the ordinance. Plaintiff strenuously contends that this ordinance was a franchise. Defendant as strenuously denies that it is. Plaintiff contends that to make it operative a referendum was required upon the filing of the petition mentioned in said section 2, title 4 of said

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city charter. Defendant claims that it was not subject to a referendum vote; that such vote was a mere straw vote. Defendant claims the ordinance was a regulatory one merely and contains none of the elements of a franchise; that the right and privilege of the Muskegon Power Company was granted by said Act No. 264 of the laws of 1905; that neither the right nor privilege to occupy the streets of said city was contained in said ordinance, but by which plaintiff had the right to the regulation given it by said act.

"The statute in question authorizes plaintiff to regulate and control, and section 7, title 4 of the charter of this city in force in 1907 provided in part as follows:

"'The common council shall have the power to regulate and control the exercise by any corporation of any franchise exercised on, in and over the streets and public places of the city, whether such franchise has been granted by the city or by and under the laws of Michigan.'

"I have no doubt that the ordinance was passed for the purpose of regulating the exercise by the Muskegon Power Company of the rights granted to it by said Act No. 264. Said section 7 provides that the common council shall have the power to regulate and control the exercise by any corporation of any franchise exercised on, etc., but the Muskegon Power Company in July, 1907, had no franchise and no purported franchise from the plaintiff. I am inclined to adopt the contention of the defendant upon this proposition. Said Act No. 264 granted to plaintiff the power to regulate the exercise of the franchise that the Muskegon Power Company then had. I am led to the conclusion that the ordinance in question was not the granting of any such rights, powers, and privileges that constituted a franchise in the sense used in paragraph 2, title 4 of said charter that required a referendum to make it effective. Said Act No. 264 uses this language:

"'That the designation and location of all lines of poles and wires shall be subject to the regulation, direction and approval of the common council of cities.'

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"The power to designate and locate was not left to the determination of the voters of the city of Grand Rapids. That authority was specifically delegated to the common council.

"Local Act No. 593, passed by the legislature of this State in 1905 and approved June 6th of that year, which act constituted the charter of the city of Grand Rapids, and section 7 of title 4 of said act, is as follows:

"'The common council shall have the power to regulate and control the exercise by any corporation of any franchise,' etc.

"This section of the charter was in force in July, 1907. By the terms of said Act No. 264 and the city charter the power to regulate and control the exercise by these utility companies of their franchise rights in the public streets of this city was vested in the common council and not in the voters. I am of the opinion that on the morning of September 9, 1907, the Muskegon Power Company had a right to locate its poles, etc., in accordance with such ordinance.

"By reason of the publication of August 17, 1907, are the rates then published substituted for the rates provided in section 13 of said ordinance? This is an important question here and one that is affirmed by plaintiff and denied by defendant. If plaintiff's contention is true, then the ordinance in question did not become effective as an ordinance until after the 17th day of September, 1907. If defendant's contention is true it was a valid ordinance on July 29th and operative September 9, 1907. The publication of the newspaper articles was after the adoption of said ordinance and before it became effective upon plaintiff's theory. Upon defendant's theory the publication in question could not be received in evidence to change or modify said ordinance because of its incompetency for that purpose.

"How does it affect the ordinance upon plaintiff's theory? By the ordinance, maximum rates only were adopted. Any rate could be fixed by the Muskegon Power Company from nothing to the maximum rate. In the publication in question, the advertisement stated that beginning with October 1, 1907, the rates therein stated would be put in force. There was no time limit stated in that advertisement.

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"Plaintiff contends that defendant is bound to use those rates and no other until the expiration of defendant's charter unless permission to do so is granted it by said city commission. Defendant contends that it was, in no event, bound to continue them longer than a reasonable time for the purpose of determining whether such rates were reasonable and equitable to both producer and consumer. There is no proof that a single voter voted 'Yes' upon the referendum in question by reason of such advertisement.

"Plaintiff contends in effect that said referendum would have been defeated had it not been for such advertisement. Defendant contends that the affirmative vote was in the majority because the consumers in the city of Grand Rapids were desirous of having the Muskegon Power Company furnish its electrical current in addition to the electrical current that was then being furnished by the Edison Company. There is no proof that those who voted in favor of said referendum did so because of their desire for the services of the Muskegon Power Company. I do not think the subject of the motive of why the votes were cast as they were on the 17th day of September, 1907, is one open to inquiry here. *People* v. *Gardner*, 143 Mich. 104; *Angle* v. *Railway Co.*, 151 U. S. 1, (14 Sup. Ct. 240); *Soon Hing* v. *Crowley*, 113 U. S. 703 (5 Sup. Ct. 730). In my judgment the referendum was advisory only. The voters were not voting on the prices stated in said advertisement. They were voting to approve and for the purpose of having made effective, not the matter stated in said advertisement, but upon the ordinance as a whole, including the rates mentioned in section 13 thereof. This the voters knew, or they should have known, because the ballot plainly so stated and upon this proposition I differ with the attorney for plaintiff upon the construction of *Township of Zilwaukee* v. *Railway Co.*, 213 Mich. 61, in that it has no application here. Upon this theory, the contract between the city and the Grand Rapids-Muskegon Power Company, as made and adopted by the common council on July 29, 1907, did not become effective until September 18, 1907, or thereabouts, and such publication was on August 17, 1907.

"The ordinance of July 29, 1907, under considera-

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tion was plain and free from any ambiguity, and it was just as free from any ambiguity as the vote on September 17, 1907. From the nature of the contract itself, I refer now to the ordinance of July 29, 1907, I do not think that such published rates could modify the terms of said ordinance. If so, it was a modification of that ordinance which counsel for plaintiff claims to be a franchise, and the section of the city charter that is invoked by counsel for relator is as follows (I refer now to section 2, title 4 of the charter in force in this city in July, 1907):

"'No franchise, whether an original grant, extension or amendment shall become operative where a petition is filed with the city clerk within 30 days after the first publication of the ordinance granting the same,' etc.

"If the rates published by the Muskegon Power Company on August 17, 1907, became effective as plaintiff claims, it was an amendment of and substitution for section 13 of said ordinance. Such published rates were carried by the Muskegon Power Company and by defendant for a reasonable length of time and defendant was not bound to continue them longer.

"Have the acts of the Grand Rapids-Muskegon Power Company and the defendant here, or the acts of either of such corporations, estopped defendant from relying upon and enforcing paragraph 13 of said ordinance? Plaintiff grounds its claims of estoppel upon the following conduct of said corporations:

"*First:* By reason of such publication itself.

"*Second:* Because the Muskegon Power Company and the defendant charged and collected only such rates for some time after October 1, 1907.

"*Third:* Because the Grand Rapids-Muskegon Power Company made an offer which the people by their vote accepted and which vote bound said Muskegon Power Company and defendant to the expiration of the charter of said defendant.

"*Fourth:* Because said Muskegon Power Company sought to increase the rates as advertised to new customers which were discontinued upon complaint of the common council of said city and ceased to charge such rates, returning to and charging such new customers the rates it advertised, and refunded all such collections made in excess of such amounts.

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"*Fifth:* That on November 29, 1918, the defendant here sought to increase its rates over said published rates and which right was denied by plaintiff, and defendant here then withdrew its claim for increased rates and those which had been collected in excess of such published rates were refunded.

"*Sixth:* For the further reason that on July 15, 1920, defendant petitioned the city commission of said city to allow a temporary increase in its light and power rates. This increase was allowed and an ordinance for such allowance was introduced for said city commission on September 10, 1920, and the same was duly passed on November 4, 1920.

"*Seventh:* Plaintiff also, as one of its grounds of estoppel, charges that defendant having accepted and acted under the ordinance of November 4, 1920, that it has waived the right and is estopped and barred during the term of said ordinance from charging any rate in excess of those thus permitted.

"Upon all these reasons so assigned by plaintiff, defendant takes issue. I will consider these reasons in the order just stated. I have already substantially disposed of the first one.

"In addition to what I have already said, it will be further noticed that the publication of the rates on August 17, 1907, did not state how long the rates were to continue. They were to be put in effect on October 1st following. No formal assent thereto was given by the common council of said city. The rates as therein stated were not voted upon, even if such vote was of any significance as affecting the ordinance in question. I do not think it had such effect. The common council of said city must have understood on April 28, 1910, that the Muskegon Power Company had not intended and did not then intend that such published rates were to be permanent. Prior to that date as to new subscribers the rates had been increased. Upon complaint of said common council such rates were reduced to make them uniform and to prevent discrimination therein.

"On said April 28th a communication was sent to said common council stating in part as follows:

"'However, to meet your views and to correct the matter of discrimination, we will on May 1st next, establish the rate of October 1, 1907, to all customers, and will give it a fair trial, frankly stating, however, that if experience still further demon-

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strates that this rate is too low, a new schedule of classified rates will be prepared based on what is considered to be wise and necessary at the time; but no change in rates will be put into effect without due and proper notice to all interested parties.'

"More significant still is that defendant had never considered such published rates as permanent.

"We have the amended ordinance increasing rates which was asked for by defendant on or about the 15th day of July, 1920, and an ordinance in compliance therewith was passed by the city commission of said city on September 27, 1920, section 2 of which ordinance was as follows:

" 'This ordinance is an emergency measure, subject to revocation at any time by the city commission, and the consent, permission and authority hereby given and granted shall continue only so long as this ordinance shall remain unrevoked and in force, and upon revocation the right to charge any rate in excess of the rates fixed under the existing franchise as construed and amplified by publication at the time of its adoption by the people, shall cease.'

"The publication referred to therein was the one of August 17, 1907.

"Section 4 of this ordinance was as follows:

" 'It is understood and the company in accepting the terms of this ordinance, expressly agrees that it shall be and is bound by the rates as published when its franchise was submitted on referendum to the people, insofar as the same are other or different from the rates fixed in said franchise upon and after the revocation of this ordinance as herein provided.'

"This ordinance so far as sections 2 and 4 thereof were concerned was rejected by defendant, and which opposition thereto was made manifest to said city commission on October 18, 1920, in a communication by defendant to said city commission, reading in part as follows:

" 'While we are desirous of meeting the views of your honorable body, we cannot accept in its present form the ordinance authorizing us to temporarily increase our commercial lighting and power rates. The rates as incorporated in the ordinance are the compromised rates as the company understood them, but the stipulation in the ordinance that if it is repealed the com-

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pany will be legally bound by rates other than those provided for in the regulating ordinance, makes it impossible for us to accept it.

" 'The rates established in 1907 were based entirely on the 1907 costs and it would not be fair and equitable to return to these rates until the 1907 costs again obtain. We would, however, be willing to accept the ordinance with a clause inserted therein that if the temporary rates are repealed the company would then agree to charge for the remainder of the 20-year period provided for in the regulating ordinance of 1907, not exceeding the following rates for residential lighting.'

"Said city commission, acting upon this communication, amended said ordinance, striking therefrom the features objectionable to defendant and entered into a new contract as to rates mentioned therein with defendant, by passing such amended ordinance on November 4, 1920, substituting for said objectionable section 2 the following as section 2 of the ordinance as passed on said last mentioned date:

" 'This ordinance is an emergency measure, subject to revocation at any time by the city commission, and the consent, permission and authority hereby given and granted shall continue only so long as this ordinance shall remain unrevoked and in force.'

"Said objectionable section 4 of said ordinance was entirely eliminated. It, therefore, clearly appears that defendant refused to be bound to return to the said advertised rates when this last contract and ordinance was repealed and revoked. Understanding this, and in compliance with defendant's expressed desires, plaintiff made the contract of said November 4, 1920. Understanding that when it should repeal said ordinance that defendant was not bound by the advertised rates, but did understand that defendant would not accept that or any other ordinance unless it was permitted to return, if it so desired, to the charges stated in section 13 of said regulating ordinance of 1907. I do not think plaintiff's contention can be sustained because the Muskegon Power Company and its successor, this defendant, charged and collected rates for some time in accordance with those advertised to be put into effect in October, 1907, by said Muskegon Power Company.

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"I do not think the third reason above stated is tenable. I do not understand that the people by their vote accepted the rates so advertised. Some of the voters probably knew, it is not at all likely that they all knew, that the Muskegon Power Company had offered to put in force the rates it advertised it would put into effect October 1, 1907.

"Plaintiff's next reason is based upon the fact that at one time the Muskegon Power Company sought to increase its rates as advertised to new customers. These rates were discontinued. They were discontinued because discriminatory. The mere fact that said Muskegon Power Company charged all its consumers the rates as advertised and refunded whatever it had collected in excess of such amounts to said new subscribers, I do not think did or could have the effect of estopping this defendant from increasing its rates at any time uniformly up to the maximum stated in said regulating ordinance.

"The fifth reason assigned by plaintiff as grounds of estoppel I do not think is effective for that purpose. Defendant desired on November 29, 1918, to increase its rates. Plaintiff objected thereto and defendant thereupon withdrew its claim for such increased rates at that time.

"The sixth and seventh reasons assigned for such estoppel is, in effect, that on July 15, 1920, defendant petitioned said city commission for a temporary increase in its light and power rates. Such rates were allowed by an ordinance adopted November 4, 1920.

"Plaintiff states its seventh reason for estoppel in the following language:

> "'Defendant having accepted and acted under the ordinance passed November 4, 1920, and derived the benefit therefrom has waived the right and is estopped and barred during the term of said ordinance from charging any rates in excess of those thus permitted.'

"I am not able to follow plaintiff's counsel in this reasoning. It does appear that on various occasions the Muskegon Power Company and defendant applied to the common council of the city of Grand Rapids and to its city commission for permission to increase rates in respect to some of its charges, and particularly in

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July, 1920, it asked permission of the said city commission to charge a rate higher than said advertised rates and higher than the maximum rate authorized by said ordinance. In asking that permission I do not believe defendant or said Muskegon Power Company waived any of its actual rights under said ordinance. The fact that defendant in July, 1920, asked for an increase in some of its rates, and which increase was thought reasonable by said city commission, and so believing by ordinance adopted on November 4, 1920, permitted such increase. This increase was continued by defendant until the revocation or repeal of that ordinance on the 10th day of March, 1921.

"The ordinance of November 4th did not go into effect until December 4, 1920. The ordinance of March 10th did not take effect until April 10, 1921. It is now plaintiff's claim and by reason of the passage of said ordinance of November 4, 1920, and the fact that the increase permitted thereby was charged by defendant, and notwithstanding its repeal on March 10, 1921, that now defendant is estopped and barred from charging any rates in excess of those thus permitted. Again I say I must admit I do not understand plaintiff's reason for such claim. If plaintiff had the right to permit the increase by the ordinance of November 4, 1920, and then revokes the same, how can it claim any binding effect upon defendant by reason thereof? I think this claim of waiver and estoppel on the part of plaintiff for this reason is of no force.

"The rates permitted to be charged by this ordinance of November 4th were in excess of said advertised rates and were in excess of the maximum rates fixed by said ordinance of July 29, 1907. If upon this proposition plaintiff is right, I do not quite understand why plaintiff provided in section 2 in its ordinance of November 4, 1920, in the first instance the following clause:

"'This ordinance shall continue only so long as it shall remain unrevoked and in force and upon revocation the right to charge any rate in excess of the rates fixed under the existing franchise as construed and amplified by publication at the time of its adoption by the people, shall cease.'

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"Up to this time plaintiff must have believed that defendant had the right to return to the rates as fixed in section 13 of said ordinance. In passing the ordinance that was finally adopted on November 4, 1920, it attempted in the first instance to effectually cut off this right. Defendant in my judgment has not waived any of its rights or is now estopped from returning to and charging the rates as fixed in said section 13 of the ordinance of 1907.

"The specific relief prayed for in plaintiff's bill is as follows, briefly stated:

> " 'That defendant be restrained and enjoined from demanding, taking or collecting from its consumers in the city of Grand Rapids any sum in excess of the published rates of August 17, 1907, for power; and restrained and enjoined from cutting off its electrical current from any of its consumers or interfering with their use thereof because of refusal on their part, or any of them, to pay an amount over the rates as published and permitted as stated in said bill of complaint; that defendant be required to account for and pay over to any person, firm or corporation any and all amounts it has collected or shall hereafter collect in excess of the rates published for current used.'

"It is my judgment that plaintiff is not entitled to any of the relief thus prayed for. I am still further of the opinion that the method adopted by the defendant in putting its rates into effect under the ordinance of November 4, 1920, and its readjusting its rates upon the repeal of said ordinance by said plaintiff are just and equitable and that plaintiff is entitled to no relief by reason thereof.

"I have read the cases cited by counsel for plaintiff upon every proposition contended for, but by reason of the length of this opinion I will not attempt to state wherein they differ in principle from the case under consideration in my judgment, nor why they are not controlling upon any of the main questions involved in this controversy.

"For these reasons plaintiff's bill of complaint must be dismissed with costs. Counsel for defendant may prepare a decree in conformity with this opinion."

The case is brought here by appeal.

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We cannot state the contention of the city better than to quote from the brief filed in its behalf:

"The principal issue in this case is whether after a franchise ordinance has been passed by the city council, and to secure a favorable vote on the referendum thereon, the company has published certain rates more favorable to the consumers than the maximum of those granted by the franchise, they are bound by such published rates. * * *

"It is our contention that the obligations assumed by the Grand Rapids-Muskegon Power Company in the advertisement of these rates and the inducement thus held out to the citizens of Grand Rapids to approve the franchise by the ballot, was more than a moral obligation. See *City of Saginaw* v. *Consumers Power Co.*, 213 Mich. 460. It was an offer made by the company and in such terms as they deemed proper. Had they desired to limit it to a certain period; had they desired to make it subject to termination at any time; had they in fact desired to in any way qualify it, it was within their power to do so, and they alone could do it, as they alone made the offer. Not having so limited it, it is our contention that it was for the life of the franchise, in connection with which the advertisement was inserted. * * *

"It is not the contention of the city as before stated, and it does not seek to modify or change the franchise contract by prior or contemporaneous evidence, rather the position of the city is that after having been granted this franchise by the then common council and having knowledge that the same was about to be submitted to a referendum vote, the Grand Rapids-Muskegon Power Company sought by every means in its power to secure a favorable vote, and as one of the most potent arguments to that end, advertised and promised the rates in question, thereby holding out to the people that a vote for the franchise would result in a vote for the rates as advertised. * * *

"The franchise, the advertisements, the referendum followed by the inauguration of the advertised rates for many years, are admitted. As between individuals the question would be a simple one. The company made an offer which the people by their vote accepted. For how long a period is the company

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bound? The answer claims for a reasonable time only. We claim for the life of the contract, as the company had within its power to have limited the period, which in its wisdom it did not do."

We do not deem it necessary to add very much to what was so ably said by the chancellor in the opinion, from which we have quoted. We think it a complete answer to the contention of the city that there is no reference whatever in the ballots which were voted to the advertisements which appeared in the papers. The vote was upon the proposition of whether the ordinance of July 29, 1907, should be approved. As already shown it was approved.

We think the decree of the court below should be affirmed, with costs to the appellee.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

GEARY *v.* GEARY.

1. CANCELLATION OF INSTRUMENTS—DEEDS—EQUITY.

On a bill by a mother to set aside a deed from her to her son, evidence *held*, insufficient to support the allegations of the bill that defendant, who was only 16 years of age at the time the conveyance was made, importuned plaintiff to execute the deed or promised as a consideration therefor to support and maintain plaintiff during the remainder of her life.

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2. SAME.

Where the conveyance was voluntarily made, and defendant has improved the property to the amount of $2,000, of which plaintiff has the use, and defendant is under no greater legal obligation to support plaintiff, who is 87 years of age, than any of her other children, a decree will be entered in this court providing that the title remain in defendant but that he pay taxes and insurance and also pay plaintiff $100 per year during her life and $100 toward the expenses of her burial.

Appeal from Livingston; Collins (Joseph H.), J. Submitted January 18, 1922. (Docket No. 87.) Decided June 5, 1922.

Bill by Rosa Geary against William Geary and another to set aside a deed. From the decree rendered, defendants appeal. Modified and affirmed.

W. P. Van Winkle & Son, for plaintiff.

Louis E. Howlett, for defendants.

SHARPE, J. On October 31, 1890, plaintiff conveyed two lots in the city of Howell to the defendant William, her son, the other defendant being his wife. There was at that time a small residence on these lots. They were worth about $725 and subject to a mortgage of $88. William was at that time about 16 years of age. Plaintiff was then ill and at the home of a daughter, Mrs. Burden, in Howell. The deed was drawn by Mr. Montague, an attorney of Howell, since deceased. It contains no reservations. The property conveyed was all that plaintiff then owned. William continued to live with her in the home and contributed to her support until 1919, when he married the other defendant. The plaintiff and her other children were much opposed to such marriage. It resulted in litigation between him and his sister, Mrs. Meyers, which reached this court. *Meyers* v. *Gearey,* 212 Mich. 449.

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Plaintiff refused to let the defendants come to her home, whereupon they mortgaged the property for $700 and went to live in Grand Rapids. In the meantime, William had improved the property to the amount of about $2,000 and had paid the taxes and provided for insurance thereon. At the time of the hearing it was said to be worth upwards of $4,000.

The bill of complaint herein is filed to set aside this conveyance from the mother to William. It is alleged therein that she was importuned to execute the deed to him and consented on his promise to support and maintain her during the remainder of her life and that he now declines and refuses to do so. In the alternative it is prayed that the expenses of her support and maintenance and her burial be decreed to be a lien on the property conveyed. In the opinion filed the trial court said:

"The court is not of the opinion that this boy under age at that time agreed as a consideration for the deed to support his mother during the period of her natural life, and it appears to the court that if there had been such an agreement made at the time of the executing of this deed, that Mr. Montague would have placed it in the deed as one of its conditions."

He refused to set aside the conveyance, but decreed that William must thereafter pay, during plaintiff's lifetime, the taxes assessed against the property, the expense of keeping the buildings thereon insured, provide sufficient fuel to comfortably heat the house, pay for any medical services and nursing needed by plaintiff, pay the expense of her burial, and pay her $200 in cash per year beginning January 1, 1921, so long as she may live. All such payments were decreed to be a lien on the property. From this decree the defendants appeal.

We agree with the trial court that the deed was executed by plaintiff without any such promise on the part of William as is alleged. We find no proof in the

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record of any importunity on his part that his mother should make the deed. She was at that time ill and, as her other children were all then grown, she conveyed this property to secure it to him in case of her death. There was talk thereafter of its re-conveyance to her, and we are satisfied that he was willing to do so, but she declined to have it done. Had he not married, or had he married a woman of plaintiff's choice as well as his own, we have no doubt that he would have continued to support her in the home as he had theretofore done.

Considering the sum he has expended in improving the property, with her knowledge and consent, he has equities the court is also bound to respect and protect. Her possession of the home has not been interfered with by him. Her daughter, Mrs. Meyers, has lived with her in the home for the past 11 years. She has employment in the city.

While this court has always exercised its equitable power to protect the interests of aged people against improvident disposition of their property, we should not unduly do so at the expense of one child whose moral or legal obligation to support an aged parent is no greater than any of her other children. Plaintiff, at the time of the hearing in April, 1921, was 87 years of age. In the ordinary course of events, her remaining years are few. Defendants' counsel insists that should she live the expectancy of life, 2.47 years, he will, under the decree, be compelled to expend over $1,300, besides losing the interest on his investment in the property, estimated at nearly $400.

We are loath to disturb the conclusion reached by the trial court. The defendants express their willingness to submit to the terms of the decree in so far as it provides for payment of taxes and insurance on the property. Her necessities seem to require that he should do more than this. With some reluctance we

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conclude that he should also pay to her $100 per year and $100 toward the expenses of her burial. The payments provided for shall begin as of January 1, 1921.

A decree may be here entered in accordance with this opinion. No costs of this appeal will be allowed. The plaintiff will recover her taxable costs in the trial court.

FELLOWS, C. J., and WIEST, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

PEOPLE *v.* WILLIAMS.

1. INTOXICATING LIQUOR—CRIMINAL LAW—VARIANCE—"TIME" OF OFFENSE—VIDELICET—CURING ERROR—INSTRUCTIONS.

   In a prosecution for violation of the liquor law, where defendant was charged with selling and keeping for sale, giving and furnishing and having possession of intoxicating liquors on July 4, 1921, the allegation of "time" being made under a videlicet, if the admission of testimony as to a sale made on July 3d was erroneous, the error was cured by the instruction of the court to the jury to disregard same; time not being of the essence of the offense.

2. SAME—MISCONDUCT OF COUNSEL—CURING ERROR—INSTRUCTIONS.

   Where defendant's counsel kept insisting that the prosecutor was asking leading questions of a certain witness, a statement by the latter "Now, just a minute, witness, I insist that this is a hostile witness and I have a right—I have a statement in a John Doe proceeding. I know

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On admissibility of expert opinion testimony, generally, see notes in 39 L. R. A. 305.

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what I am up against in liquor cases and I am not going to stand for it at all," *held*, although improper, not prejudicial error, in view of the instruction of the court to the jury that the statement was improper and to disregard it.

3. SAME—EVIDENCE—SUFFICIENCY—DIRECTED VERDICT.
Where the testimony offered, if believed, would justify the jury in finding defendant guilty of the offense charged, the court was not in error in refusing to direct a verdict in his behalf.

4. SAME—ARGUMENT OF COUNSEL—PENALTY FOR OFFENSE NO CONCERN OF JURY—INSTRUCTIONS.
Where defendant's counsel argued to the jury that they should not separate defendant from his wife and send him to a felon's cell, the court properly instructed them that they were not concerned in the penalty, and should not be influenced thereby.

Exceptions before judgment from Newaygo; Barton (Joseph), J. Submitted January 13, 1922. (Docket No. 161.) Decided June 5, 1922.

Alfred Williams was convicted of violating the liquor law. Affirmed.

Willard G. Turner, Jr., for appellant.

William J. Branstrom, Prosecuting Attorney, for the people.

BIRD, J. Defendant was informed against and convicted in the Newaygo circuit court for having violated Act No. 338 of the Public Acts of 1917, as amended. The information charged him with selling and keeping for sale, giving and furnishing and having possession of intoxicating liquors on July 4, 1921. The first witness for the people testified, under objection, that defendant sold him liquor on July 3d. The second witness gave evidence of a sale to him on July 4th. Subsequently the court struck out the testimony of the first witness with reference to the sale on July 3d, and the case went to the jury on the sale made on July

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4th. Defendant assigns error on the admission of the testimony of the sale of July 3d as giving testimony of another and distinct offense. The allegation of "time" was made under a videlicet, and had there been no proof of a sale on the 4th it would have supported the allegation in the information. 3 Comp. Laws 1915, § 15746; *Keator* v. *People*, 32 Mich. 484. The question of "time" was not of the essence of the offense, but the court subsequently struck out all the evidence pertaining to the sale on July 3d, and at the close of the case charged the jury as follows with reference to it:

"Respondent's counsel calls my attention to a transaction alleged to have taken place on the 3d and the evidence in relation thereto. I think the record is clear on that. You recall I instructed you you should not consider that for any purpose whatsoever, and for fear I have not, I again instruct you that you should not pay any attention to that testimony whatsoever. This respondent has nothing to do with that charge, and you should not weigh it in connection with this case at all, the transaction whereby it is claimed liquor was sold to Shippy on the 3d of July. That should be eliminated from your mind."

In view of this admonition just at the close of the case we think the error was cured, if it can be said to have been one under the rules of evidence, and the count charging possession of intoxicating liquors.

2. Complaint is made of a statement made by the prosecutor while examining one of his witnesses. Defendant's counsel kept insisting that the prosecutor was asking leading questions. These had been objected to several times and some of them excluded on that ground. Finally the prosecutor said:

"Now, just a minute, witness, I insist that this is a hostile witness and I have a right—I have a statement in a John Doe proceeding. I know what I am up against in liquor cases and I am not going to stand for it at all.

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"*Mr. Turner:* I object to the statement of counsel before a jury.

"*The Court:* Mr. Prosecutor, that is an improper statement and the jury will disregard it."

As the court instructed the jury, the statement was an improper one and should not have been made by the prosecutor. But if errors of this character were always reversible error, seldom would a case be tried without reversible error. We are unable to see that the defendant's case was seriously prejudiced by the incident.

3. Counsel insists that the trial court was in error in refusing to direct a verdict in behalf of the defendant at the close of the trial. The testimony of the second witness sworn by the people, if believed, would justify the jury in finding defendant guilty of the offense charged. We think no error was committed in this respect.

4. Complaint is made of the following instruction to the jury:

"It has been argued you should not separate this man from his wife and send him to a felon's cell. You are not concerned in that; you are not concerned in the penalty, that is a matter for the discretion of this court, and if you were informed in any way as to the penalty that might be handed out, you should not be influenced thereby."

This instruction was not error. If counsel insists upon making appeals of that character to the jury he must be content to have them corrected by the trial court. We find no reversible error assigned.

The judgment of conviction is affirmed.

FELLOWS, C. J., and WIEST, CLARK, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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WICKETT *v.* DETROIT UNITED RAILWAY.

STREET RAILWAYS—NEGLIGENCE — PERSONAL INJURIES — CROSSING ACCIDENT—QUESTION FOR JURY.

In an action for personal injuries to a boy four years of age caused by a collision between the automobile in which he was riding and one of defendant's street cars at a street intersection, testimony supporting plaintiff's allegations that the street car was operated at a negligent rate of speed over and across the intersection, and that the motorman failed to give warning of his approach, *held*, sufficient to make it incumbent upon the trial court to submit the case to the jury, under proper instructions; no question being raised as to plaintiff's contributory negligence on account of his age.

Error to Wayne; Jayne (Ira W.), J. Submitted January 4, 1922. (Docket No. 23.) Decided June 5, 1922.

Case by Morley R. Wickett, an infant, by his next friend, against the Detroit United Railway for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Corliss, Leete & Moody and *A. B. Hall,* for appellant.

Sibley, Armstrong & Mead, for appellee.

BIRD, J. Morley R. Wickett, a boy 4 years of age, was riding in a closed automobile driven by his mother, in a westerly course on Jefferson avenue in the city of Detroit. It was a wet day and about 3 o'clock in the afternoon. In driving she followed a train of two street cars going in a westerly direction. When the Jefferson street cars stopped she would stop, and when they started she would start, and in this

On the question as to whether operating street car at speed in excess of that prescribed by ordinance as negligence or evidence of negligence, see note in 8 L. R. A. (N. S.) 1093.

On evidence as to speed of street cars generally, see note in 34 L. R. A. (N. S.) 784.

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way she followed the train for several blocks. When the street cars stopped at the intersection of Jefferson and Chene streets plaintiff's mother stopped her car. When the street cars started she started her automobile, but before she could cross the intersection a Chene street car going rapidly in a northerly direction passed in front of her so quickly that she was unable to stop her car and a collision occurred which threw plaintiff out of the car and seriously injured him. In the trial court a verdict was rendered by the jury in behalf of the plaintiff.

Counsel complain because the trial court refused to direct a verdict for the defendant on the ground that no actionable negligence was shown upon the part of the defendant. The declaration charges that the Chene street car was operated at a negligent rate of speed over and across the intersection, and the testimony of the boy's mother tends to support this allegation. She testified:

"I came down Jefferson about 3 o'clock in the afternoon coming down town. I followed the Jefferson street car for about four blocks. It was a wet day, and when I came to the corner of Jefferson and Chene street I stopped when the Jefferson street car stopped; it was a double car and I was at the rear end. When the Jefferson street car moved I moved, but the Jefferson car went past it, and just as I got to the Chene street crossing, the Jefferson car going first—just enough to clear the track, the Chene street car dashed right in front of me. I did not even try to stop the car because I did not see it. I struck the Chene street car at the front end of the car. The whole car was smashed."

It was clearly the duty of the motorman operating the Chene street car to use reasonable care in operating his car over and across the intersection so as to avoid collisions with the passing traffic on Jefferson avenue. It is plaintiff's claim that the Chene motorman was farther away from the Jefferson cars than

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the automobile was and, therefore, the motorman could see the automobile much easier than the driver of the auto could see the Chene car. This was due to the fact that the auto was behind and a little to the north of the Jefferson cars. It was not until the Jefferson cars moved away and increased the distance between them that the driver could see to the south. When this occurred it was too late to avoid a collision under plaintiff's claim. The questions of speed and the failure of the motorman to give warning of his approach were also questions for the jury. These respective questions as to the care which the Chene motorman exercised involved questions of fact which are not within our province to decide. They were properly submitted to the jury.

No question is raised as to the contributory negligence of the plaintiff on account of his tender years. We are of the opinion that while the testimony is somewhat meager as to the negligence of the defendant there was sufficient to make it incumbent upon the part of the trial court to submit it to the jury. The trial court was in no error in refusing to set aside the verdict.

The judgment is affirmed.

FELLOWS, C. J., and WIEST, CLARK, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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NOWATARSKI v. DUSZA.

VENDOR AND PURCHASER—INJUNCTION—FRAUD.

In a suit to enjoin defendants from evicting plaintiff from certain premises which he was purchasing on a land contract, to have a circuit court commissioner's judgment for restitution of said premises set aside, and to have plaintiff's right in said premises determined, the finding of the court below that the judgment of restitution and the statement of the amount due upon the contract were obtained by fraud, and therefore should be set aside *held*, sustained by the record, and the case is remanded for further proofs as to the state of the account between the parties unless counsel agree thereon.

Appeal from Wayne; Moinet (Edward J.), J., presiding. Submitted January 3, 1922. (Docket No. 5.) Decided June 5, 1922. Rehearing denied July 20, 1922.

Bill by Albert Nowatarski against Marcel Dusza and others to set aside a judgment of ouster, and for an accounting. From a decree for plaintiff, defendants appeal. Affirmed.

Baubie & Baubie, for plaintiff.

Harry J. Lippman (*Ralph W. Liddy*, of counsel), for defendants.

BIRD, J. In September, 1917, plaintiff exchanged his farm of 240 acres at Harrietta at a value of $13,500 for an equity which Jacob Pokojski and wife owned in a 4-family flat situate on Dubois street, in the city of Detroit. Plaintiff took possession of the same in November, 1917. Maryan Jaszczynski and his wife, Maryana, were Pokojski's vendors. About the time that plaintiff made the exchange with Pokojski, Jas-

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zczynski and wife placed their contract with defendant Dusza to secure the payment of $600, which they owed him. After the assignment was made by way of security, plaintiff having no knowledge of it, he paid to Jaszczynski the sum of $322.86 to apply on his contract. After he learned that the contract had been assigned to Dusza he paid him $75 to apply thereon, and Dusza promised to wait for the payment of the $322.86, which was due, until he, plaintiff, could get it back from Jaszczynski. Dusza did not keep his promise but instead, a short time thereafter, he went before a circuit court commissioner and started summary proceedings to put plaintiff out of possession. In this proceeding he secured a judgment of ouster and a statement in the judgment that there was due on the contract the sum of $481.86. It was shown that this sum included the payment which plaintiff had made to Jaszczynski. Dusza then said to plaintiff move or pay rent. Plaintiff thereafter for a time paid rent as a tenant. When plaintiff learned that defendant Dusza was claiming to own the premises and asserting that plaintiff had no interest in them he consulted counsel and these proceedings were begun to establish his rights and have the judgment before the commissioner vacated.

The record shows that plaintiff is of Polish extraction and is unacquainted with the English language. Defendant is also Polish, but he was not only well versed in English, but was well acquainted with our business methods. The amount of property which plaintiff put into the contract was $11,600. He was proceeding to make his payment of the balance at the rate of $75 per month. The defendant, Dusza, knew these facts, yet he proceeded to pursue a course which, if successful, would wipe out all of plaintiff's equity in the property and leave him penniless. He did not demand immediate payment from the plaintiff He did not serve any notice of forfeiture of plaintiff's rights in

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the premises, but proceeded to take out process from the commissioner's court, and had it served on plaintiff, and then misrepresented to him as to what it was done for. Plaintiff went before the commissioner as commanded, but he did not understand the proceedings. He says he was told by Dusza that it involved the question of commissions. He was not represented by counsel. Dusza testified that he was the owner of the property and that plaintiff was in default in his payments. This enabled him to obtain judgment as there was no defense.

The chancellor found as a fact that Dusza was not the owner of the premises, that he simply held a contract as security for the payment of $600 which Jaszczynski owed him. The chancellor also found that the judgment of restitution and the statement of the amount due upon the contract were obtained by the fraud of defendant and accordingly set them aside. He further found that Dusza forced plaintiff, by his fraudulent methods, to become his tenant. We are in accord with the conclusions reached by the chancellor. The record is very persuasive that defendant undertook to, and did, take an unconscionable advantage of one of his ignorant countrymen who was unacquainted with our language and our methods of transacting business, the result of which was to extinguish his entire interest in a property for which he had recently paid upwards of $11,000. Unless counsel can agree upon the state of the account, the case will be remanded for further proofs.

The decree is affirmed.

FELLOWS, C. J., and WIEST, CLARK, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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JONES *v.* SNYDER.

DEEDS—CONSTRUCTION—JOINT TENANCY—CONTINGENT REMAINDER.

Under a deed conveying land to four persons, "as joint tenants, and to their heirs and assigns, and to the survivors or survivor of them, and to the heirs and assigns of the survivor of them, forever," a joint tenancy for life in the grantees was created, with a contingent remainder in fee simple to the survivor, and, therefore, one of the grantees could not alienate his joint interest so as to cut off the contingent remainder.

Appeal from Bay; Snow (Ernest A.), J., presiding. Submitted January 10, 1922. (Docket No. 69.) Decided June 5, 1922. Rehearing denied November 2, 1922.

Bill by Julia E. Jones against Flora B. Snyder and others for a partition of certain real property. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Edward S. Clark and *Victor Spike* (*Albert C. Hirsch* and *Watson & Freeman*, of counsel), for plaintiff.

Stoddard & McMillan, for defendants.

BIRD, J. Plaintiff filed this bill to partition certain real estate in Bay City in which she claimed an undivided one-half interest. Flora B. Snyder was made a defendant as well as the tenants occupying the real estate. Flora B. Snyder appeared and denied that plaintiff had any interest in the real estate. A hearing on the merits followed and convinced the chancellor that defendants' position was the correct one and plaintiff's bill was dismissed.

The facts out of which the question in controversy

On validity and effect of a deed by one co-tenant purporting to convey a parcel in severalty to a third person, see note in 47 L. R. A. (N. S.) 573.

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has developed are, in substance, these: In 1905, Melvin A. Root, an elderly man, was the owner of certain residence and business property in Bay City. He had recently lost his wife, and having no children he was very lonely. He conceived the idea of inviting Jared M. Snyder, his brother-in-law, then employed in Washington, D. C., to come with his wife and daughter and take charge of his business interests, occupy his dwelling, and make a home for him. He estimated that the income from the business property was large enough to furnish support for all of them and furnish him with opportunity and the means to spend some of his time in travel. He further conceived the idea of placing the title of said property in the Snyders and himself in joint tenancy. After some reflection the Snyders accepted his proposition and moved to Bay City and took charge of Mr. Root's business matters and Mrs. Snyder took charge of the household duties. Mr. Root, to carry out his plans, conveyed the title to said residence and business property to one Frantz, and in turn he conveyed it to Melvin A. Root, Jared M. Snyder, Susan W. Snyder and Flora B. Snyder, *"as joint tenants, and to their heirs and assigns, and to the survivors or survivor of them, and to the heirs and assigns of the survivors or survivor of them, forever."* (For a full text of the deeds see 161 Mich. 200.) Matters went along smoothly for a time but before the end of two years Mr. Root grew tired of his new relations and filed a bill to set aside this conveyance. His claim was that the Snyders had failed to carry out their agreement with him and that there was no consideration paid for the conveyance, and asking that the conveyance be set aside. This litigation resulted in sustaining the conveyance of the real estate and giving Mr. Root the whole use of the residence property and one-third of the income from the business property. (161 Mich. 200.) Subse-

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quently, and in 1908, Mr. Root went to live with a second cousin, Julia E. Jones, the plaintiff herein. He remained with her until his death. In March, 1919, Mr. Root conveyed to said Julia E. Jones an undivided one-half interest in said residence and business property. At the date of this suit Mr. and Mrs. Snyder were deceased and defendant Flora B. Snyder was the only survivor of the four grantees in the deed of joint tenancy. Flora B. Snyder's claim is that Mr. Root's deed to Julia E. Jones did not convey any interest in the property, but that she herself took the entire interest as survivor. The question in the suit is: Did Julia E. Jones get any interest in the real estate by her deed from Mr. Root?

Both parties concede that the deed made the parties joint tenants of the real estate. Plaintiff asserts that Mr. Root, as a joint tenant, had a right to convey his interest to plaintiff. Defendants contend that by reason of the stipulation in the deed that the property should go to the survivor or survivors, he could not alienate his joint interest.

Much time has been devoted by plaintiff to the question whether one joint tenant can alienate his joint interest. If the deed created a simple joint tenancy there is no question but Mr. Root could sever his interest. That question need not be further considered. The real question is, Does the addition of the words "survivor or survivors" change the rule that one joint tenant may sever the tenancy? Defendants rely upon the cases of *Schulz* v. *Brohl*, 116 Mich. 603, and *Finch* v. *Haynes*, 144 Mich. 352 (115 Am. St. Rep. 447), to sustain their contention that the tenancy cannot be severed.

The chancellor was of the opinion that these cases controlled the present one. In principle there is no distinction. Technically there is this distinction: In the Michigan cases cited the "survivorship" is at-

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tached to a tenancy in common, whereas, in the present case, the "survivorship" is attached to a joint tenancy. We are unable to see why the rule laid down in the Michigan cases should not be applied in both classes of tenancy. The words "survivor or survivors" attached to the granting clause indicate an intention upon the part of the grantor to create something more than a mere joint tenancy. The word "survivor" attached to the estates in common in the Michigan cases cited carried them to the survivor, and we see no valid reason why it should not operate the same with a joint tenancy. If we construe the deed as a pure joint tenancy we give no effect whatever to the words "survivor or survivors." It is quite evident that those words were used by Mr. Root for some purpose, and we think that purpose must have been to secure the property to the longest liver or to the survivor. Under this view we must construe the deed as creating a joint tenancy for life in the grantees with a contingent remainder in fee simple to the survivor. This construction was given to the provisions of a will where the testator gave the remainder of an estate to seven devisees (naming them) in joint tenancy. *Quarm* v. *Quarm* (1892), 1 Q. B. Div. 184 (61 L. J. Q. B. 154, 66 L. T. Rep. [N. S.] 418, 40 Weekly Reports, 302). To one who is attempting to find the right solution the case cited is a very interesting and instructive one by reason of its similarity and reasoning. A portion of the opinion of Lord Chief Justice Coleridge is given below:

"In this case we have to place a construction upon a clause in a will dated in 1840, shortly after the Wills act came into operation, and evidently drawn by a lawyer. Section 28 of the Wills act enacts 'that when any real estate shall be devised to any person without any words of limitation such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dis-

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pose of by will in such real estate, unless a contrary intention shall appear by the will.' Therefore it is said unless a 'contrary intention appears by the will' the effect must be to make the seven devisees joint tenants in fee; and in that case the joint tenancy in fee has been severed and put an end to owing to the conveyance of his share by one of the joint tenants. But it is urged on behalf of the plaintiff that when the whole clause is looked at, a 'contrary intention' does appear—an intention, that is, to make these persons, not joint tenants in fee, but tenants for life, with a contingent remainder in fee simple to the ultimate survivor; and that this is shewn by the use of the words 'and to the survivor or longest liver of them, his, or her heirs and assigns forever'; and it was admitted on behalf of the defendants that, if this is not their true construction, these words must be regarded as not only inconsistent with the rest of the clause, but as useless. It is familiar law that effect should, if possible, be given to every word which the testator uses, and the interpretation suggested by the plaintiff does this. It gives effect to all the terms of the settlement, makes none of them nugatory, and places a plain and intelligible meaning on the words of the will. There is, therefore, good *prima facie* reason for adopting it."

We are of the opinion that the conclusion reached by the chancellor is right and should be sustained.

The decree is affirmed.

FELLOWS, C. J., and WIEST, CLARK, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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HUGHITT *v.* SAYEN.

1. EVIDENCE—PRINCIPAL AND AGENT—HEARSAY.
   In an action on two promissory notes, where defendant claimed a set-off by reason of certain railway ties furnished plaintiffs, for which he claimed they had failed to give him credit, testimony by defendant as to what a man, who he claimed was sent by plaintiffs to inspect and load the ties, told him as to the number of ties left on the ground, was hearsay and incompetent.

2. SAME.
   The admissions of an agent are only evidence against the principal when they constitute part of the *res gestæ*—when they accompany the transaction in which the agent acted, and what he states at a subsequent time is inadmissible.

3. TRIAL—INSTRUCTIONS.
   An instruction by the court, based on a conversation between defendant and one of the plaintiffs, allowing the jury to find a sale of the ties to plaintiffs at said time, although plaintiffs already claimed to own them under a contract of sale in writing, and said written contract was relied on by defendant in his special notice, *held*, reversible error.

4. SAME—NEW TRIAL—EVIDENCE—WEIGHT OF EVIDENCE.
   Where the verdict of no cause of action was more favorable to defendant than he was entitled to under his own testimony, plaintiffs' motion for a new trial should have been granted.

Error to Delta; Collingwood (Charles B.), J., presiding. Submitted January 20, 1922. (Docket No. 117.) Decided June 5, 1922.

Assumpsit by Orrin N. Hughitt and others, copartners as A. J. Hughitt & Sons, against Joseph E.

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Sayen on certain promissory notes. Judgment for defendant. Plaintiffs bring error. Reversed.

Lewis & Pierson (*Naegely & Pierson*, of counsel), for appellants.

N. C. Spencer, for appellee.

STEERE, J. In the summer of 1914 plaintiffs, who were operators and dealers in forest products, had business relations with defendant, who was engaged in getting out and selling ties, in connection with which two notes were given by him to them, one for the sum of $1,200 dated July 2, 1914, due in one year after date with interest at 7 per cent. and the other for the sum of $1,000 dated September 1, 1914, due six months after date with interest at 7 per cent., and the following contract was entered into between the parties:

"Memorandum of agreement, made and entered into this 24th day of July, 1914, by and between Joseph E. Sayen, of Rock, Michigan, party of the first part, and A. J. Hughitt & Sons, parties of the second part, witnesseth:

"That for the sum of one dollar in hand paid and other valuable considerations, the receipt of which is acknowledged, the said first party agrees to sell and deliver to the said second parties, or their assigns, and the second parties agree to buy and receive, all of the pulpwood, railway ties, posts and poles that shall be bought or gotten out by the said first party during the season of 1914 and 1915, all to be f. o. b. cars unless otherwise agreed upon.

"Prices for the above named forest products shall be mutually agreed upon, on or before January 1, 1915.

"JOS. E. SAYEN.
"A. J. HUGHITT & SONS.

"Witnesses:
"F. J. HAMMACHER.
"CAROLINE HAMMACHER.
"Made in Duplicate."

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On September 15, 1919, plaintiffs brought an action in the circuit court for the county of Delta to recover the amount due upon these two promissory notes with interest and also upon an open account in favor of the Escanaba Hardware Company amounting to $213.15 which had been assigned to plaintiffs, less a credit given upon said notes as of date December 1, 1917, for $677.48. Defendant pleaded the general issue, with special notice that pursuant to the contract quoted he had delivered to plaintiffs at Hill's Spur and Duga's Spur, Beaver branch of the Chicago & Northwestern Railway, 10,000 ties during the winter of 1914-1915, "delivery being made and accepted by plaintiffs in the summer of 1917;" that no price for the same was agreed upon between the parties and at the time plaintiffs accepted them they were worth 60 cents each; "that the plaintiffs have not accounted to the defendant for the said ties and that the defendant will set-off the amount due him for said ties against the plaintiffs' demand and asked that the balance be certified in his favor." Upon the trial the notes were offered and received in evidence without objection, and the open account was conceded to be correct, the total sum so shown due plaintiffs amounting to the sum of $2,415.39. The only dispute as to the correctness of this demand is defendant's claim of set-off for ties delivered to plaintiffs in the summer of 1917 and not paid for by them. The trial court submitted the case to the jury, resulting in a verdict with judgment thereupon in favor of defendant of no cause of action.

During the progress of the trial various objections were made by plaintiffs' counsel to admission of claimed hearsay evidence. At conclusion of the testimony they moved to strike out the same and for a directed verdict, which was denied. Thereafter plaintiffs moved for a new trial on various grounds, which

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was also denied. Refusal to strike out certain testimony claimed to be hearsay, to direct a verdict for plaintiffs, erroneous instructions to the jury and refusal to grant a new trial on the grounds stated in the motion therefor, are assigned and argued as errors.

Defendant's claim of set-off is for ties gotten out and piled at Hill's spur and Duga's spur on the Beaver branch of the Chicago & Northwestern Railway, by jobbers working for him during the winter of 1914 and 1915, pursuant to and following the contract made in July, 1914. These he claimed amounted to 7,732 ties at the two places, 6,232 being at Hill's spur and 1,500 at Duga's. With the exception of 500 "loaded out" at Duga's in 1915 he claimed they remained at the two spurs until the summer of 1917 when they were delivered to or accepted by plaintiffs, at which time cedar ties were worth 48 cents each and the tamarack ties, amounting to about 1,000, were worth 35½ cents.

Plaintiffs admit receiving and shipping 2,635 ties from those points in 1917, for which they claim the price was agreed upon and that amount constituted all the ties he furnished them from there; that when taken they paid or credited him in full for the same at 44 cents for cedar ties and 34 for tamarack. Except as to an agreed price this does not appear to be denied and, although at times denying, defendant himself during his cross-examination admitted an agreed price as follows:

"*Q.* Isn't it true that Mr. Bert. Hughitt and yourself got together and agreed upon prices?

"*A.* Yes, I think we did.

"*Q.* Do you remember what the verbal agreement was and how much?

"*A.* No, I don't remember what the prices were."

Defendant's counsel said in his opening:

"Hughitt & Sons went up there and loaded a quanti-

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ty of these ties; loaded out the amount they have given credit for; and there being various other dealings between them, and it seems according to Hughitt & Sons everything was balanced except these notes. So they loaded out a portion of the other ties, and then quit for a while. They did not load out quite half; considerably less than half; and when they went up again after the ties the ties had disappeared. It appears that somebody had stolen them. Thereupon Hughitt & Sons refused to give Mr. Sayen any further credit for these ties, and insisted that it was his own loss."

We do not find it claimed anywhere in the record that plaintiffs themselves "had stolen" or taken without accounting and giving credit for the 5,097 ties which added to the 2,635 they did take and account for make the total of 7,732 ties defendant claims were gotten out at the two spurs in the winter of 1914-1915.

Plaintiffs contend they took all the ties there were at those spurs and defendant produced no competent evidence there were more.

The testimony to establish his claimed delivery of the 5,097 ties which had disappeared is given by defendant himself, who stated in substance that he told Mr. Hughitt in the fall of 1916 he had a chance to dispose of the ties at those sidings to Tom Connors of Negaunee and he thought "we had better get rid of them as soon as we could and get them out of there," and Mr. Hughitt said, "No, to leave them alone, that they will ship them themselves;" that they did load out 2,635 ties the next summer (1917) and the first defendant knew of it he met in Escanaba the man who inspected the ties loaded out, and was told by him they had been loading the ties and there were more left than they had loaded. Further interrogated, he stated the man who so told him was Mr. Bennett, inspector for the Chicago & Northwestern Railway Company which bought the ties loaded out from plain-

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tiffs, and that Hughitt said to him that he sent Bennett up there to load the ties. Plaintiffs' counsel then moved the court to strike out defendant's testimony as to what Bennett told him for the reason it was incompetent because hearsay, Bennett was not shown to have represented plaintiffs and in any event the statement was made after the ties were loaded and the claimed agency ended, and admissions by an agent after termination of his agency are not competent evidence to bind his former principal. This motion was denied.

Defendant testified that he had not been back there since the spring of 1916 until the summer of 1917 after the ties were gone, and his testimony as to what Bennett told him is the only distinct evidence of more ties there in the summer of 1917 than were loaded out. Aside from Hughitt's denial that Bennett was their agent for loading the ties or that he had ever told defendant he sent him up there for that purpose, such special agency would scarcely authorize the agent to bind his principal by such statements or admissions, and clearly not when made after his agency ended as shown here. To bind the principal admissions must accompany the transaction in which the agent acted. If made before the agent was employed by the party against whom they are sought to be used or after such employment terminated, they cannot be received in evidence. 22 C. J. p. 380. That rule is of long standing in this jurisdiction. *Benedict* v. *Denton,* Walk. Ch. 336; *Horner* v. *Fellows,* 1 Doug. 51; *Converse* v. *Blumrich,* 14 Mich. 109, 122; *North* v. *Metz,* 57 Mich. 612; *Maxson* v. *Railroad Co.,* 117 Mich. 218. In *Converse* v. *Blumrich, supra,* it is said:

"But the admissions of an agent are only evidence against the principal when they constitute a part of the *res gestæ.* They must accompany the transaction in which the agent acted; what he states at a subsequent time is inadmissible." Citing authorities.

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In charging the jury the court referred to defendant's testimony that he proposed to Hughitt in the fall of 1916 that they sell the ties and get them out of there, which the latter refused to consent to, stating they would "ship them themselves," and said:

"It is his (defendant's) claim that Hughitt & Sons, through their authorized agent, or representative, told him not to sell them, claiming that the ties belonged to them and they would sell them and credit the amount to Mr. Sayen. While these exact words were not used, it is claimed by Joseph Sayen that it amounted to such a contract.

"Now it becomes your duty to decide from the evidence in this case whether such a sale was made at that time. This matter is disputed by Mr. Hughitt and it becomes your duty to find out whether that sale was made at that time."

This disregards defendant's claim as put in issue by his special notice, which was whether the ties contracted for under the written agreement of July 24, 1914, were delivered by him and accepted by plaintiffs in the summer of 1917. By that contract he had agreed to sell and deliver those ties to plaintiffs. They had made advances to him on the contract and were entitled to them. No time of delivery was specified in the contract. He made no tender or demand for immediate performance on their part but only told of a party who might buy them and, if his statement is accepted, that "we had better get rid of them as soon as we could and get them out of there," with which Hughitt did not agree, and later, pursuant to the original agreement as claimed in his special notice, defendant delivered those ties "gotten out and purchased by him in the winter of 1914 and 1915, such delivery being made and accepted by the plaintiffs in the summer of 1917." That conversation was in its final import but a re-assertion of the original agreement by plaintiffs acquiesced in by defendant, and certainly

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was not proof of delivery and acceptance under it in 1917 as he alleges and makes claim for in his special notice.

Defendant's own testimony is at times interspersed with hearsay and self-contradictions, and unsupported in various particulars where, if as he claims, direct and convincing evidence by others would seem obtainable. In his claim for ties delivered in the summer of 1917 he includes 1,000 ties at Duga's spur, and also says there were no ties at that spur in the fall of 1916. The only man who got out ties at that spur in the winter of 1914-1915 testified that he got out 1,200 ties that winter and loaded them out for defendant in 1915, 700 in the spring and the balance in the fall, which defendant directed sent to Cummins Brothers, and that no ties went from that spur during 1917.

But accepting all defendant's evidence, hearsay and otherwise, with plaintiffs' ignored, and assuming he should be allowed for the number and kind of ties he testifies to, as of November, 1916, when Hughitt refused to let him sell them to Connors, we are unable by any figures he presents to compute a set-off which entirely extinguishes plaintiffs' undisputed claim. His own testimony eliminates Duga's spur, but if included he testified the ties there were all tamarack and would run 15 per cent. culls. He also stated those at Hill's spur were about 15 per cent. cedar and the balance tamarack, and would run about 10 per cent. culls. Deducting for the culls he admits and cost of loading, his credit at the market price he claimed would yet leave a balance in plaintiffs' favor.

Eliminating defendant's hearsay and wholly incompetent evidence and taking into reasonable consideration the evidence produced by plaintiffs, we are impelled to the conclusion that the set-off awarded by the

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jury is unreasonable, against the clear weight of evidence and excessive.

For the errors above noted the judgment is reversed, with costs to plaintiffs and a new trial granted.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and MOORE, JJ., concurred.

The late Justice STONE took no part in this decision.

RICKETTS v. FROEHLICH.

TRIAL—EVIDENCE—CIRCUMSTANTIAL EVIDENCE AS OPPOSED TO DIRECT TESTIMONY—QUESTION FOR JURY.

In an action for the wrongful death of plaintiff's decedent, alleged to have been caused by defendant's recklessly driving his automobile at an excessive rate of speed directly across a well-defined safety zone in a city street, where there was ample circumstantial evidence from which the jury in balancing probabilities might fairly conclude that defendant was the driver of the car which caused the accident, the trial court was in error in directing a verdict in favor of defendant, notwithstanding his denial that he was the driver of the car and the lack of testimony positively identifying him as such.

Error to Wayne; Webster (Arthur), J. Submitted January 3, 1922. (Docket No. 15.) Decided June 5, 1922.

Case by Mary Ricketts, administratrix of the estate of Alexander W. Ricketts, deceased, against Edward

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A. Froehlich for the alleged negligent killing of plaintiff's intestate. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

Dohany & Dohany, for appellant.

S. Homer Ferguson, for appellee.

STEERE, J. At about 9 o'clock in the evening of January 31, 1918, plaintiff's husband was run over and fatally injured by an automobile while standing in a safety zone on Gratiot avenue in the city of Detroit just east of Riopelle street on the north side of the Gratiot avenue car tracks waiting to take a street car. The automobile was recklessly driven at an excessive speed of over 25 miles an hour directly across the well defined safety zone near the middle of which deceased stood, knocking him down with its left front fender, both the left front and rear wheels passing over his body. After striking him the driver of the automobile sped on, ignoring signals and other attempts of bystanders to stop him, disappearing down the street at increasing speed. Two young men standing close by barely escaped being struck by the car. One was a salesman for the Detroit Screw Works and the other a student at the Cass technical high school. Both caught the license number of the car, 29,238, which was given to a patrolman who came to the scene of the accident. He made the customary investigation, took the names of witnesses and turned in a report of the accident with the number of the car, which a witness had identified as a Dodge, when he went off duty that night. In the confusion of the accident and rapid passing of the car none of the witnesses saw the man sitting within and driving it sufficiently plain to identify him.

Four days before the inquest on deceased the police authorities had found a Dodge automobile bearing li-

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cense number 29,238 at 1565 Mack avenue where a tin shop was located called the Garland Tin Shop. The business conducted there was then incorporated. Defendant was its president, his wife secretary and treasurer and his brother vice-president, the three constituting the incorporators. Defendant resided in rooms over the tin shop. The license for the car found there was issued to the Garland Tin Shop Corporation, application therefor having been signed and verified by defendant. He was accustomed to drive this car and admitted he was out with it alone the night of the accident and drove it down town, but denied he went by Gratiot avenue and claimed to have been in another part of the city when the accident is said to have occurred. The car was later taken to the police station and seen by several witnesses who were not permitted by the court to testify to the condition of its left front fender, claimed by the plaintiff to have been bent or dented.

At conclusion of the testimony the trial court directed a verdict for defendant, saying in part:

—"the only showing made by the plaintiff to connect Mr. Froehlich with the driving of this car is the connection with the car in the neighborhood of 7:30 at the corner of Canfield and Sheridan and again at 10:30 driving down town by a different route from Gratiot avenue. * * * there is no evidence in this case from which you would be warranted in finding that he was actually driving the car."

Plaintiff's only assignment of error is directed against this disposition of the case by the court.

Plaintiff's evidence of the identity of the tort feasor responsible for this fatal accident was necessarily circumstantial. Circumstantial evidence in support of or against a proposition is equally competent with direct. As against each other their relative convincing power is for the jury. The trial court apparently

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assumed that defendant's direct denial must be taken as true against all circumstantial evidence introduced.

"To hold that in all cases when a witness swears to a certain fact the court must instruct the jury to accept that statement as proven, would be to establish a dangerous rule. Witnesses sometimes are mistaken and sometimes unfortunately are wilfully mendacious. The administration of justice does not require the establishment of a rule which compels the jury to accept as absolute verity every uncontradicted statement a witness may make." *Yonkus* v. *McKay*, 186 Mich. 203, 210 (Ann. Cas. 1917E, 458); citing *Woodin* v. *Durfee*, 46 Mich. 424.

The undisputed testimony in this case shows that the Dodge auto which struck and killed deceased was driven at an unlawful and reckless rate of speed in a grossly negligent manner directly across the safety zone on which prospective passengers were awaiting the coming of a street car. It bore a Michigan license for the year 1918 numbered 29,238. The Dodge car entitled to and actually bearing that number on the night in question was in the custody of and being driven by defendant. It was taken out of the garage where he lived by him early in the evening and by him safely returned late that night to the place from which he took it. He drove it around town and down town and parked it for a time at Cadillac square, as he said was his custom when he came down town. He first drove it shortly after supper to his brother's home at the corner of Elba and Mt. Elliott streets and from there, as he finally orientated himself after some evasion, he drove to visit a young lady living in a flat at the southwest corner of Canfield and Sheridan streets where he timed his arrival as between half-past 7 and 8 o'clock. Why he went there or how long he remained he does not make clear but he gives his next move from there to Cadillac square, where he parked his car at about 11 o'clock, he thought. At

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each of these places on resuming his journey he found his car where he left it, undisturbed so far as he knew. There is absolutely no evidence that any one but himself drove or touched his car that evening from the time he left home shortly after supper until he returned with it about midnight, beyond his statement that he did not drive it down Gratiot avenue where the accident occurred that evening. The young woman he claimed to be visiting about the time of the accident was not produced as a witness. The most direct route either from his own home, the home of his brother, or the flats where he visited the young lady, to Cadillac square, where he testified he last parked his car, was by Gratiot avenue past the spot where deceased was killed. He had driven an automobile around Detroit for four years and was familiar with its thoroughfares. His reasons for taking a different route and account of his whereabouts during that evening were in certain respects evasive and at times conflicting. There was ample circumstantial evidence from which the jury in balancing probabilities might fairly conclude that he was the driver of the car which caused the accident. His testimony, backed by an impelling motive, was not so consistent, clear and convincing that the jury was bound to accept it in its entirety as conclusive proof. It was for them and not the court to pass upon his credibility.

The judgment is reversed, with costs to plaintiff and a new trial granted.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and MOORE, JJ., concurred.

The late Justice STONE took no part in this decision.

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MOULTHROP *v.* CITY OF DETROIT.

1. MUNICIPAL CORPORATIONS—CHARTER REQUIREMENTS—EVIDENCE—BURDEN OF PROOF.

   The burden of proof rests upon plaintiff, in an action on a claim against a municipality, to show compliance with the charter requiring presentation of claim to the common council for audit and allowance as a prerequisite to bringing action.

2. SAME—ADMISSIONS—SPECIAL NOTICE.

   A superfluous special notice admitting that a petition with affidavit attached was filed with the common council, but charging it was not in accordance with requirements of the charter, is not an admission that the mandatory provision of the charter had been complied with.

3. SAME—FAILURE TO SHOW COMPLIANCE WITH CHARTER—DIRECTED VERDICT.

   In an action against the city of Detroit, where it was neither alleged in the declaration nor shown by plaintiff's proofs that his claim for damages to a leased building had been presented to the common council of the city for audit, etc., as required by the charter, defendant was entitled to a directed verdict.

Error to Wayne; Barton (Joseph), J., presiding. Submitted January 24, 1922. (Docket No. 126.) Decided June 5, 1922. Rehearing denied July 20, 1922.

Assumpsit by Harry C. Moulthrop against the city of Detroit for rent. Judgment for plaintiff. Defendant brings error. Reversed.

James R. Walsh (*Clarence E. Wilcox*, of counsel), for appellant.

Edward A. Rich (*Henry P. Seaborg*, of counsel), for appellee.

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STEERE, J. On March 12, 1917, the city of Detroit through its board of health leased from plaintiff a building known as the Irwin apartments, to be used as nurses' quarters for the period of one year thereafter at an annual rental of $14,400 payable monthly in advance, or at the rate of $1,200 per month. An epidemic of scarlet fever was then prevalent in the city of Detroit, resulting in an overcrowded city hospital near by not having capacity to accommodate its nurses and the building was secured to house them. The lease contained in customary form a provision that the city of Detroit would at its own expense during the continuance of the lease "keep the said premises and every part thereof in as good repair and at the expiration of said term yield and deliver up the same in like condition as when taken, reasonable use and wear thereof and damage by the elements excepted." Having occupied the building for the purpose stated during the year the lease ran the city vacated the premises at the end of the term and delivered the same over to plaintiff. He claimed that after the place was surrendered an examination of its condition disclosed serious unrepaired damage done to the building during the city's tenancy, for which it was liable under its covenant to keep and return the premises in good repair as when taken, etc. Claiming it would require an expenditure of over $2,000 to place the building in as good repair as when taken over by the city, he presented his claim to the board of health therefor. After investigation and inspection of the building the board refused to recognize his demand except as to a few minor items.

On October 25, 1918, plaintiff commenced this action against the city to recover the amount of his claimed damages, filing and serving upon defendant's counsel a bill of particulars amounting to $2,287.30, which included a month's rent of $1,200 to cover the time the

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building was idle while undergoing necessary repairs. His declaration was upon the common counts in assumpsit with a special count covering defendant's claimed violation of its lease in the particular related.

Defendant first pleaded the general issue, and thereafter by amended plea gave special notice of defense under its charter as follows:

"That the claim of this plaintiff was never audited, allowed or rejected by the common council of the city of Detroit as provided in said charter. That the affidavit attached to the petition filed with the common council of the city of Detroit was not in accordance with the charter of said city; that the petition filed with the said common council sets forth the sum of $2,175.37, whereas the bill of particulars in above entitled cause sets forth the sum of $2,287.30, and in the declaration filed herein this plaintiff is asking damages in the sum of $5,000; that the said claim of $2,287.30 nor the $5,000 above set forth were never presented to the common council for audit and allowance as prescribed by the city charter."

The city charter in force at the time of this lease provides as follows:

"The common council shall audit and allow all accounts chargeable against the city, but no unliquidated account, or claim, or contract shall be received for audit or allowance unless it be accompanied with an affidavit of the person rendering it, to the effect that he verily believes that the services or property therein charged have been actually performed or delivered for the city, that the sums charged therefor are reasonable and just, and that, to the best of his knowledge and belief, no set-off exists, nor payment has been made on account thereof, except such as are included or referred to in such account or claim. It shall be a sufficient bar and answer to any action or proceeding in any court for the collection of any demand or claim against said city, that it has never been presented to the common council for audit or allowance, or if on contract, that it was presented without said affidavit and rejected for that reason or that the action or proceeding was brought before the common

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council had a reasonable time to investigate and pass upon it."

Plaintiff's declaration contained no allegation that the above condition precedent had been complied with and he offered no testimony to that effect during the trial. At the conclusion of plaintiff's testimony defendant's counsel moved for a directed verdict on the ground among others that plaintiff's claim had never been properly presented or audited, as indicated in defendant's notice under the plea of the general issue. The motion was denied and renewed again at the close of all the testimony, with added requests to charge fully covering plaintiff's failure in pleadings and proofs to comply with the charter requirements quoted, which were refused. Plaintiff recovered a verdict with judgment thereon for $2,000.

The question raised and argued in counsel's briefs is whether plaintiff's action should fail because his claim was neither alleged in his declaration or shown by his proofs to have been presented to the common council of the city of Detroit for audit, etc., as the charter requires. That during the entire trial of this case plaintiff's pleadings and proofs were silent as to and entirely ignored the quoted provisions of the charter is beyond denial on the record before us, but plaintiff's counsel points to defendant's special notice under its plea of the general issue and asserts that by it defendant admits the claim was presented to the common council, accompanied by an affidavit of the claimant, and that

—"the claim was never rejected for the reason that it was presented without an affidavit, or that the action or proceeding was brought before the common council had a reasonable time to investigate and pass upon it."

The following singular statement, in view of the record, is also made in plaintiff's brief:

"On the 31st day of July, 1918, a petition was filed with the clerk of the common council asking for

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damages sustained to the building through the occupancy of the board of health, a copy of said petition being served upon the corporation counsel and a copy also mailed to the secretary of the board of health. From that date on, there was no action taken by the common council in the way of allowance or rejection of the claim. Therefore upon the 25th day of October, 1918. this suit was started in the circuit court for the county of Wayne."

No copy of the petition or affidavit appears in this record or is shown to have been offered in evidence or produced on the trial. Accepting as true the above quoted statements in plaintiff's brief (off the record except as appears in defendant's special notice) it can only be suggested that if those facts were alleged in the declaration and sustained by proof upon the trial they might materially alter the aspect of the case.

It is first contended for plaintiff that the infirmity in the declaration claimed by defendant being apparent on the face of the pleading it should have been raised by demurrer; that it was not only waived by pleading the general issue, but not having given special notice of the ground of objection until long after, nor raised the question during the trial until plaintiff rested, it comes too late to be entertained.

In *City of Detroit* v. *Paving Co.*, 38 Mich. 358, a like provision of the city charter was before the court. Holding that to present a claim against the city to its common council for audit and allowance as required by its charter was a prerequisite to an action for its recovery, the court said in comments sustaining that view:

"The statute designs, as far as possible, to avoid the bringing of lawsuits, and to require an attempt to settle as a condition precedent to suing. It does not require any plea to be put in asserting that the claim was never presented, and inasmuch as the plaintiff must always know whether or not this was done, he cannot need to be informed of it by notice."

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In *Springer* v. *City of Detroit*, 102 Mich. 300, the question was again before the court on a like provision of the charter. The declaration failed to allege the claim had been presented to the common council. In that case defendant's counsel nevertheless did under his plea of the general issue give notice that he would insist in its defense upon the trial "that plaintiff's claim was never presented to the common council of Detroit for audit and allowance as required by its charter." On the trial he early objected to plaintiff's evidence on that ground which was overruled, and at the close of the testimony he requested a directed verdict in defendant's behalf because it had not been shown that statutory requirement had been complied with, which was denied. Plaintiff had judgment and on review after discussing questions not material here it was said of this objection, "our own court has settled this in favor of the contention made by defendant," and the judgment was reversed.

In *Selden* v. *Village of St. Johns*, 114 Mich. 698, the question arose under a similar provision of the statute as to villages. An inadequate attempt was made to comply with the statute by serving notice in writing upon the village clerk. The original record also shows an allegation in the declaration that a verified paper in writing stating the nature of plaintiff's claim and that he intended to "hold the village of St. Johns liable for such damages" was served upon the clerk. Defendant's counsel filed only a plea of the general issue. When plaintiff sought to prove the allegation in his declaration and offered the notice filed with the village clerk defendant's counsel said he had "no objection to its going in evidence now but might have some objections to offer later." At the close of plaintiff's testimony he moved for a directed verdict on the ground that the statutory prerequisite had not been complied with, which the court overruled and plaintiff had judgment. On review in this court plaintiff's

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counsel claimed, as is claimed here, that the objection came too late and was waived upon the trial. It is said in the opinion:

"One ruling was sufficient, and it was not necessary for the defendant to again raise the point."

The judgment was reversed for the reason that plaintiff had failed to show compliance with the statutory prerequisite.

The only disturbing element in this case, because novel, is defendant's notice of special defense garnished with the admission of an "affidavit attached to the petition filed with the common council," the saving grace of which is, however, that the notice asserts it "was not in accordance with the charter of said city." Counsel for defendant impute this special notice to the provision in Circuit Court Rule No. 23 which requires special notice to be given of an affirmative defense. To contend that plaintiff has failed to make out a case is not an affirmative defense.

Previous decisions make plain that the burden of proof rests upon plaintiff in an action against a municipality to show compliance with such charter or statutory prerequisites as are under consideration here before recovery can be had. A superfluous special notice admitting that a petition with affidavit attached was filed with the common council but charging it was not in accordance with requirements of the charter is not an admission that the mandatory provision of the charter had been complied with.

For the foregoing reasons the judgment is reversed, with costs to defendant, and the case remanded for such further proceedings as the trial court may determine in harmony with this opinion.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and MOORE, JJ., concurred.

The late Justice STONE took no part in this decision.

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SANDERS v. DETLAFF.

1. VENDOR AND PURCHASER—REAL ESTATE BROKER—PRINCIPAL AND AGENT—EVIDENCE—SUFFICIENCY.

   In a suit for the foreclosure of a land contract, where, in the consummation of the contract, defendant dealt with a real estate agent without having any direct dealings with the vendors, evidence *held*, insufficient to establish that said agent acted exclusively as the agent of defendant.

2. SAME — COVENANT FOR POSSESSION — LIABILITY FOR BREACH — NOTICE OF LEASE—ESTOPPEL.

   A covenant in a land contract to give the purchaser possession at its date is binding upon the vendors and creates a liability for its breach even if the purchaser knew there was a tenant upon the property, since he had a right to assume, when the contract was made, that the vendors could and would give him possession according to its terms.

3. SAME—TENDER OF ASSIGNMENT OF LEASE NOT COMPLIANCE WITH COVENANT FOR POSSESSION.

   Vendor's contention that they absolved themselves from liability by tendering, on delivery of the contract, an assignment of the lease to the purchaser with a check for rent collected after the date of the contract and a letter directing the tenant to attorn to the new landlord comes too late, where, on refusal of the purchaser to accept said assignment and demand by him for possession, vendors took steps to comply therewith and gave him belated possession.

4. SAME—LIABILITY FOR BREACH OF COVENANT OF POSSESSION NOT EXTINGUISHED BY BELATED COMPLIANCE.

   Subsequent removal of the obstructing incumbrance and putting the purchaser in possession would not extinguish the right of action or relieve from liability for damages resulting from being kept out of possession in the meantime.

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5. SAME—PURCHASER ON CONTRACT NOT ENTITLED TO POSSESSION UNLESS SO PROVIDED.

A contract to sell with deferred payments, and silent as to possession, does not give the purchaser right of possession until full and final payment is made.

6. SAME—BREACH OF COVENANT FOR POSSESSION—MEASURE OF DAMAGES—RENTAL VALUE.

The measure of damages for breach of covenant for possession resulting from an unexpired lease on the premises has usually been held, in the absence of special circumstances, to be the fair rental value of the property during the time the purchaser is kept out of possession.

7. SAME—EVIDENCE—RENTAL VALUE.

While the rent actually being paid under the lease for the land for farm purposes was competent evidence, it was not necessarily conclusive as to the actual rental value, especially where it was immediately available for manufacturing purposes and was bought and sold on that basis.

8. SAME—RENTAL VALUE INTEREST ON PURCHASE PRICE.

Where there was testimony that the fair rental value was the interest on the purchase price for the time the purchaser was deprived of possession, which is also in accord with the general rule, the decree of the court below awarding damages on said basis will not be disturbed on appeal.

Appeal from Wayne; Goff (John H.), J. Submitted January 6, 1922. (Docket No. 44.) Decided June 5, 1922.

Bill by Fielder Sanders and others against A. J. Detlaff for an accounting and the foreclosure of a land contract. From the decree rendered, all parties appeal. Affirmed.

Lloyd L. Axford and *W. E. Tarsney*, for plaintiffs.

Stellwagen, MacKay & Wade, for defendant.

STEERE, J. This bill was filed June 30, 1920, for an accounting as to the amount due upon and foreclosure of a land contract of date October 17, 1919,

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for the purchase by defendant from plaintiffs of a piece of real estate called the Griffin farm consisting of 33 and a fraction acres lying near Detroit in Greenfield township, Wayne county, described as E. ½ of W. ½ of S. E. ¼, sec. 30, T. 1 S., R. 11 E., excepting a small portion at the northerly end occupied by the Pere Marquette Railway Company and a parcel previously deeded to the Pennsylvania-Detroit Railroad Company. The purchase price was $118,639.85 of which $25,000 was payable at the date of the contract, with balance in installments of $18,727.97 each year for 5 years thereafter with 6% interest from the date of the contract, payable semi-annually on all sums unpaid. The $25,000 payment was made on or before delivery of the contract. The agreement executed between the parties followed the customary form for land contracts, providing amongst other things that defendant should have possession from date of the contract, pay all taxes against the property thereafter assessed and in case of default in any payment for more than 30 days the entire principal sum should become due and payable. In brief, plaintiffs allege in their bill default by defendant in payment of interest due April 17, 1920, and the taxes due December 1, 1919, which they themselves paid on June 29, 1920, whereby the entire principal sum of the contract became due and payable, asking by reason of such default foreclosure in usual form.

Defendant answering in avoidance and denial, alleged by way of cross-bill that although he was entitled to possession of said premises on the date of the contract according to its terms, plaintiffs withheld possession from him until April 17, 1920, preventing him, because he could not give possession, from completing a profitable sale of a portion of the property and from erecting a large factory on the balance of the land as he had arranged, to his great damage, for which

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reasons he asks reformation of the contract by dating the same April 17, 1920, the time when possession was actually obtained by him, making the annual installments fall due on that date of each year, that he be paid or credited by plaintiffs with interest until that time on the $25,000 paid them when the contract was entered into and that he be decreed against plaintiffs his damages sustained by reason of their failure to deliver possession, alleged at a large sum, and for such further relief as may be agreeable to equity and good conscience.

This deal was conducted and consummated through real estate agents without the contracting parties seeing or directly communicating with each other on the subject. The property was in charge of a real estate agency called the James S. Holden Company with which it was listed for sale by plaintiffs who lived in Cleveland, Ohio. Defendant was the head and principal owner of a manufacturing concern engaged in making automobile parts, located on Lafayette avenue, Detroit. It had outgrown its location and defendant was looking for a suitable site on which to build a new factory. Various sites had been called to his attention by different real estate dealers. A real estate agent named Hibbard, at whose office he had previously bought a piece of property, submitted to him two sites, one being the Griffin farm which, owing to expansion of Detroit in that direction and recent location of the Pennsylvania railway line upon a portion of it, had become available and valuable for manufacturing or other business purposes. Defendant was favorably impressed with the location. Some negotiations as to terms between them followed during which Hibbard said he "had that place for sale" for the Holden company, and in reply to an offer by defendant said he would have to see his people. He later returned and declined the offer but submitted a

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price which defendant accepted. He then on Hibbard's suggestion gave him a check for $2,500 to "close the deal," payable to the latter's order, and signed a preliminary agreement to purchase. Hibbard produced an abstract of the property which defendant told him to submit to his attorney and if it was all right he would give him the balance of the $25,000 according to the terms agreed upon. A defect in the title pointed out by defendant's attorney was corrected and the contract involved here signed by the respective parties was delivered by Hibbard who indorsed over the $2,500 check previously made to him and defendant gave him a check for $22,500 payable to the Holden company in full of first payment as agreed.

It appears that at the time this contract was entered into there was an outstanding lease upon the property and tenant in possession. The Holden company gave Hibbard that lease assigned to defendant with a letter addressed to the tenant directing him to thereafter pay rent to the new owner, and a check of the Holden company for $70.83 payable to defendant as a refund of rental which it had previously collected. Defendant testified that he knew nothing about this lease until some time after the contract was closed when Hibbard came to him with the check and told him about the lease. He refused to accept the same, insisting that he bought the property clear with right of immediate possession at the date of the contract and wanted it turned over to him clear; that he had negotiated sale of a portion and made tentative plans to erect a factory upon that which he retained, but was prevented by inability to get possession of his property. He thereafter refused to make further payments on the contract until plaintiffs gave him possession. After some controversy plaintiffs instituted proceedings to evict the tenant before a commissioner in defendant's name and, as its attorney stated, "did

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forceably eject him," giving defendant possession on May 17, 1920. The trial court granted plaintiffs a decree of foreclosure for the amount due on the contract less interest on the purchase price which accrued between October 17, 1919, the date of the contract, and May 17, 1920, when possession was given. From this decree both parties appealed.

Three propositions are argued by counsel, being the question of Hibbard's agency, effect of the covenant in the contract giving possession of the property from its date, and the measure of damages. As to Hibbard's agency, it is contended by the Holden company for plaintiffs that they dealt with Hibbard as defendant's agent, and from beginning of the transaction in September until some time after it was closed every step in the proceeding in behalf of defendant was taken by Hibbard as his agent; that Hibbard was advised of the existence of the lease early in the negotiations and his knowledge was imputable to his principal; and also before closing the deal defendant visited the occupied property and was put upon inquiry as to what rights the occupant had.

Defendant testified that Hibbard was not his agent but came to him at his office claiming to represent the Holden company which had the property for sale and solicited him to purchase; that he did not employ him but dealt with him as plaintiffs' representative, never knew or recognized him as his agent, nor paid or agreed to pay him for his services. The vice-president of the Holden company admitted Hibbard received compensation from them and they "split their commission with him."

There is no direct evidence in this case that defendant ever hired Hibbard as his agent to transact this business for him. It is conceded that plaintiffs' agency paid him for his services in helping to make the deal. He is not shown to have received or asked

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compensation from any other source. Defendant's testimony is undisputed that he did not employ him, never agreed to compensate him in any way for his services, and did not do so, but dealt with him at arms' length as representative of the agency which had this property listed for sale. The facts shown are not convincing that Hibbard acted exclusively as agent of defendant. Neither are we impressed that his agency is a controlling factor in this controversy. Even if defendant knew there was a tenant upon the property the covenant in plaintiffs' contract to give possession at its date would be binding upon them and create a liability for its breach. A vendor can covenant against an existing incumbrance in the nature of a lease or otherwise, and with such an express agreement as to possession the purchaser is not put upon inquiry and called at his peril to exercise diligence by reason of the property being occupied to his knowledge. *Edwards* v. *Clark*, 83 Mich. 246 (10 L. R. A. 659); *Simons* v. *Diamond Match Co.*, 159 Mich. 241. In the latter case it was conceded plaintiffs' damages were nominal. Here it is not. Defendant had a right to assume when the contract was made that plaintiffs could and would give him possession according to its terms. When they sought to transfer the lease of their tenant to him he promptly refused to accept it. There was no subsequent oral agreement with him on that subject. Any previous oral agreement could not prevail against the written agreement between the contracting parties.

Defendant testified that he had from the time the contract was entered into offered and stood ready to perform on his part, claiming only that because of plaintiffs' failure to perform on their part he is entitled to have deducted from the payments provided by said contract the substantial damages sustained by him through plaintiffs' default in not timely carrying out their agreement relative to possession.

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The measure of damages runs with the question of the effect of the written covenant for immediate possession in the land contract. That the lease given by plaintiffs which prevented prompt delivery was an incumbrance is not disputed. It is first urged in their behalf that they absolved themselves from liability by tendering on delivery of the contract an assignment of the lease to defendant with a check for rent collected after the date of the contract and a letter directing the tenant to attorn to the new landlord. If ever of any force that contention comes too late. This tender was refused by defendant and plaintiffs' agent promptly so advised. No such course was provided for in the original agreement or formal written contract which they gave to him. In compliance with it they afterwards gave him belated possession and having ratified the contract as accepted by him now seek to foreclose it in this chancery suit.

Plaintiffs' counsel also urge that only nominal damages are recoverable in actions for breach of covenant where the incumbrance is removed by the grantor without expense or trouble to the grantee, and at most damages cannot exceed the rental value of the premises for the time defendant was kept out of possession. Undoubtedly a right of action at once arose in favor of defendant for nominal damages for breach of covenant when plaintiffs failed to give him possession on his demand after the contract was signed and delivered. Subsequent removal of the obstructing incumbrance and putting defendant in possession would not extinguish the right of action or relieve from liability for damages resulting from being kept out of possession in the meantime.

A contract to sell with deferred payments and silent as to possession does not give the purchaser right of possession until full and final payment is made. Here by special covenant of seizin in fact immediate pos-

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session is given, a personal covenant relating to the land which, though not running with it as a covenant real, was essential to its use and enjoyment and a right of more than nominal value.

The measure of damages for breach of covenant resulting from an unexpired lease on the premises has been usually held in the absence of special circumstances to be the fair rental value of the property during the time the purchaser is kept out of possession (7 R. C. L. p. 1183), which plaintiffs contend is evidenced and to be determined by the rental specified in the unexpired lease.

The rent actually being paid while competent evidence is not necessarily conclusive as to the actual rental value. The outstanding lease manifestly was based on a modest rental of the land for farm purposes, while at the time of this transaction it had reached a far greater value for other purposes. Plaintiffs sold it to defendant for approximately $3,500 an acre. Changed conditions had then greatly enhanced its value, rendering it suitable and immediately available for manufacturing and other urban business activities. Plaintiffs sold and defendant bought on that basis. Defendant at once negotiated the sale of a portion which he did not need for his purposes at a much greater price per acre than he paid and prepared to utilize the balance for his own manufacturing purposes. While the fact that the land was bought and about to be used for a particular purpose of which the seller was not advised does not authorize recovery beyond the recognized rule of damages for breach of covenant such testimony, like the price at which it was sold, is competent as bearing upon the general or actual fair rental value of the premises. In *Wetherbee* v. *Bennett*, 2 Allen (Mass.), 428, it is said:

"The fact that an estate can be sold is one of its

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elements of value, and is not to be excluded from consideration; though it is not to be considered as a reason for enhancing damages that the purchaser acquired it for a special purpose of selling it again directly."

Plaintiffs' evidence only showed the rent actually paid under the terms of the unexpired lease which during its life constructively evicted defendant and kept him out of the use and enjoyment of the premises.

Defendant showed by the testimony of a real estate agent and dealer named Miller, of 20 years' experience in buying, selling, renting and managing various kinds of real estate in Detroit and vicinity both improved and unimproved, that in his opinion a fair rental value of that property would be 6% on the purchase price or, in this case, for the time possession was withheld.

In *Fritz* v. *Pusey*, 31 Minn. 368 (18 N. W. 94), which involved an outstanding lease, it is said with citation of supporting authority:

"The underlying principle is that the damages should be estimated according to the real injury arising from the existence of the incumbrance, which, in the case supposed, is presumably and ordinarily the value of the use of the premises for the time during which the vendee has been deprived of such use."

Directed to the principle of real injury arising from existence of the incumbrance, it is generally held in cases of breach of covenant for quiet enjoyment that the measure of damages is the consideration paid for the property with interest (7 R. C. L. p. 1179), which by analogy suggests interest on the purchase price of the premises during the time defendant was denied all use, enjoyment, rents and profits from the same as a fair basis for damages within the general rule of the value of the use, or rental value, which also has support in the expert testimony introduced by the defendant.

We find no occasion to disturb the conclusions

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reached by the learned trial judge and the decree will stand affirmed. As both parties appealed, costs will be equally divided between them.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, and MOORE, JJ., concurred.

The late Justice STONE took no part in this decision.

KOMARYNSKI v. POPOVICH.

1. RELIGIOUS SOCIETIES—CHURCH PROPERTY—RIGHT TO POSSESSION —EQUITY JURISDICTION—QUO WARRANTO—TITLE TO OFFICE.
   Allegations in a bill filed by plaintiffs claiming to be the lawful trustees of a religious corporation, praying to be so adjudged, and to be put in possession of the church property and records now in possession of defendants who also claim to be the lawful trustees, *held*, to state a case within the jurisdiction of a court of equity, and plaintiffs' remedy is not limited to *quo warranto* proceedings to try the title to the office of trustee, since there is something besides title to office involved. WIEST, J., dissenting.

2. PLEADING—PRACTICE—MOTION TO DISMISS.
   The practice of filing an answer denying the material allegations of the bill, and then nearly two months later filing a motion to dismiss is not approved; the better practice being to file the motion to dismiss before or with the answer.

Appeal from Wayne; Goff (John H.), J. Submitted January 5, 1922. (Docket No. 33.) Decided June 5, 1922.

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Bill by John Komarynski and others against Andrew Popovich and others for an injunction and an accounting. From a decree dismissing the bill, plaintiffs appeal. Reversed.

Ernest N. Pappas, for plaintiffs.

August Cyrowski, for defendants.

WIEST, J. (*dissenting*). Plaintiffs claim they are the lawfully constituted trustees of St. John's Greek Catholic Church, a religious corporation in the city of Detroit, and they filed the bill herein to be so adjudged and to be entitled to the possession of the church property and records now in possession of defendants Andrew Popovich, president, Theodore Worko, Peter Poczywak, Ilko Procaylo, Mike Paslawski, Paul Fortuna and John Forys, who they say constitute the new board of trustees, but whose election to that office they attack and charge to have been illegal and void. The charges against the other defendants all hinge upon the question of who are the lawful trustees. Answers made by defendants under oath, as required by the bill, aver the plaintiffs are not trustees and defendants above mentioned are the lawful trustees, and the answers fully meet the charges made. Upon motion of defendants the circuit judge dismissed the bill on the ground that it presented no case of equitable cognizance and plaintiffs' remedy, if any, to try out the title to the office of trustee is on the law side of the court by information in the nature of *quo warranto*.

The bill shows on its face that defendant trustees are in office under color of authority of an election and have possession of the corporate property and are not *de facto* officers or mere volunteers or intruders, unless their election to the office was void. The bill herein was not filed by the corporation, but by per-

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sons claiming to be the lawful trustees of the corporation. The purpose of the bill is to remove from possession, management and control of the corporate affairs the trustees in possession and control and make way for the plaintiffs, who claim to be the true trustees, and to put them in possession by way of mandatory injunction.

This is not a suit against the trustees of the corporation, in recognition of their official character, to set them right and keep them in the right way as officers. This suit does not involve the ownership of the property, as that is vested in the corporation. The corporate affairs of the church appear to be under the control and management of trustees. But who are the trustees? That question must be answered before the court can send out its mandatory injunction taking possession from one set of trustees and giving the same to another set. The relief prayed for by plaintiffs, if any is granted, can come only after determination that the defendants are usurpers. It is not within the power of the court of chancery to take away from lawful trustees the management of the corporate affairs or to determine who are the lawful trustees and by injunction install them. If the defendants are not entitled to the office which they assume to hold and the functions which they are exercising, proceedings should be instituted for the direct purpose of trying their right thereto and of evicting them if they are usurpers.

In *Commonwealth, ex rel. Gordon,* v. *Graham,* 64 Pa. St. 339, *quo warranto* was held the proper remedy against persons usurping the office of trustees of a chartered church.

In *Attorney General, ex rel. Dusenbury,* v. *Looker,* 111 Mich. 498, *quo warranto* was held the proper remedy by which to try title to the office of director of a private corporation.

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22 R. C. L. p. 666, states:

"The question has been frequently raised as to whether the remedy by *quo warranto* may be employed to test the right to an office in a private corporation. * * * In nearly all the States of this country it is held that the remedy by *quo warranto* or information in the nature thereof lies against one who usurps an office in a private corporation. The general principle underlying this conclusion is that corporations chartered by the State, or organized under the general statutes of the State are public franchises, regardless of the character of the corporation, and that the usurpation of a corporate office, therefore, amounts to the usurpation of a privilege granted by the State. With respect to the manner of their creation and the use of the remedy by *quo warranto* there is in principle no difference between the office under a municipal corporation and one under a private corporation. They are all offices of a public character. Thus an information in the nature of *quo warranto* may be filed to test the right of a person to the exercise of the office of the trustee of a corporate church, or the director of a manufacturing corporation, and in the case of many other particular offices."

In *Carpenter* v. *Clark*, 217 Mich. 63, we had occasion to review the authorities upon the pivotal question here involved, and held *quo warranto* to be the proper remedy to determine the validity of an election and title to office in a corporation.

The learned circuit judge properly dismissed the bill, and the decree entered in the circuit should be affirmed with costs to defendants, but without prejudice to the right of plaintiffs to file an information in the nature of *quo warranto*.

FELLOWS, C. J. I do not agree with the view that a court of equity is without jurisdiction to determine the rights of the parties in this controversy. *Bear* v. *Heasley*, 98 Mich. 279 (24 L. R. A. 615); *Richter* v. *Kabat*, 114 Mich. 575; *Borgman* v. *Bultema*, 213

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Mich. 684. In each of these cases a similar controversy was considered by this court and the rights of the parties determined. In *Richter* v. *Kabat, supra,* the jurisdiction of a court of equity was directly assailed and distinctly sustained. We there quoted with approval from the opinion of present Chief Justice Taft in *Brundage* v. *Deardorf,* 55 Fed. 839, the following language:

"The peculiar character of the possession by the church trustees, and of the use by the pastor and congregation, makes it clear that a mere action in ejectment would be quite inadequate as a remedy to secure the complainant trustees, and those whom they represent, the same peculiar possession and use for them. The writ of injunction is well adapted to prevent an unlawful intrusion in the pulpit by the pastor, and an unlawful use by the congregation, against all of whom it would be obviously impracticable to institute proceedings in ejectment."

We also there cited with approval *Trustees, etc., of New Elm* v. *Hoessli,* 13 Wis. 348. In this case it was said by the Wisconsin supreme court:

"The entire value of such property consists in its free and undisturbed use and enjoyment for religious worship. Considering, therefore, the nature of this property, the use and purpose to which it is dedicated, the mischief arising from acts of trespass upon it, and the insufficiency of the ordinary legal remedies, we must say that, in our opinion, the complaint states a proper case for an injunction."

There is something beside title to office here involved. The ownership, possession and control of the church property is involved. I think the court should have entertained jurisdiction and overruled the motion to dismiss.

I do not think the practice followed in this case should be approved. Defendants filed answers denying the material allegations of the bill. Nearly two months thereafter this motion to dismiss was filed. I

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think the better practice requires that the motion to dismiss should be filed before or with the answer. 3 Comp. Laws 1915, § 12456; *Horner* v. *Building Co.*, 197 Mich. 530.

I think the decree should be reversed and the case remanded for hearing on the merits and that plaintiffs should have costs of this court.

CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred with FELLOWS, C. J.

The late Justice STONE took no part in this decision.

GRAND RAPIDS BEDDING CO. *v.* GRAND RAPIDS FURNITURE TEMPLE CO.

1. MASTER AND SERVANT—WORKMEN'S COMPENSATION ACT—LIABILITY OF THIRD PARTY—NEGLIGENCE—LEGAL LIABILITY.

   The liability of a third person to an employer, under the provisions of the workmen's compensation act (2 Comp. Laws 1915, § 5468), for the amount paid as compensation to an employee or his dependents under said act, arises only where such third person is guilty of negligence creating a legal liability, and unless a legal liability exists the action may not be maintained.

2. SAME—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—ELEVATORS.

   Where an operator was provided for an elevator in a building owned by defendant and occupied by a number of tenants, of which plaintiff was one, and a buzzer was installed for the purpose of summoning the operator to the desired floor, but plaintiff's employee, disregarding the buzzer, opened the elevator doors at the ground floor

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On rights and remedies under compensation acts where injuries were caused by negligence of third person, see notes in L. R. A. 1916A, 360; L. R. A. 1917D, 98; L. R. A. 1918F, 524.

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although they were nearly closed, and, thinking the elevator was at that floor, stepped inside, when he fell to the bottom of the elevator shaft and received injuries causing his death, he was guilty of contributory negligence, as a matter of law, barring an action by his employer under the workmen's compensation act to recover compensation paid to the employee's widow for his death.

3. SAME — CUSTOM — NOTICE — NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

If there was a custom of leaving the elevator doors partly open when the elevator was at the ground floor, if such opening was notice that the elevator was there, if it was an invitation to enter and use the elevator, and if defendant had notice of such established custom, then the questions of defendant's negligence and deceased's contributory negligence were for the jury.

4. SAME—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY.

Although the testimony as to such custom was very meagre, it cannot be said that there was no such testimony.

5. SAME—EVIDENCE—WEIGHT OF EVIDENCE—NEW TRIAL—NOTICE.

In the absence of a motion for a new trial, the Supreme Court will not weigh the evidence as to such custom, except to say that it did not establish so notorious a custom that it can be said, as a matter of law, that defendant had notice of it, nor was there testimony of actual notice.

6. TRIAL—INSTRUCTIONS—CUSTOM—NOTICE.

The trial court was in error in refusing defendant's requested instruction, or the substance of it, that "even if you find that there was such a custom, unless you find that defendant had notice or knowledge of such custom, your verdict must be for the defendant."

7. CUSTOMS AND USAGES—NOTICE—NEGLIGENCE.

A person may not be held guilty of negligence for the breach of a duty created by a custom of which he has neither actual or constructive notice.

Error to Kent; Brown (William B.), J. Submitted January 19, 1922. (Docket No. 115.) Decided June 5, 1922.

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Assumpsit by the Grand Rapids Bedding Company against the Grand Rapids Furniture Temple Company for the amount of an award against plaintiff under the workmen's compensation act. Judgment for plaintiff. Defendant brings error. Reversed.

Stevens T. Mason, for appellant.

Lombard & Atkinson, for appellee.

Plaintiff under the provisions of the workmen's compensation act was required to pay compensation to the widow of Edward F. Mulzer, one of its employees, and brings this action for indemnity under the provisions of section 15, part 3, of the act (2 Comp. Laws 1915, § 5468). Defendant owns a 9-story building in Grand Rapids. It is rented to dealers who there exhibit their wares. In January and July of each year buyers in large numbers come to Grand Rapids and during these months some 60 exhibitors, among them plaintiff, occupy this building. During the balance of the year but few exhibits, some four or five, are kept there, plaintiff being among the few tenants who maintain exhibits during the entire year. There was an elevator in the building; it was reached by a few steps up from the entrance; there was a lobby at the landing; there were mirrors on the elevator and around it. During the "off season" the janitor operated the elevator, and there was a bell or buzzer used to call him which he could hear anywhere in the building. The elevator was not an automatic one. Mr. Mulzer was one of plaintiff's salesmen. On August 15, 1919, accompanied by his wife he took a prospective customer to defendant's building. When the party reached the lobby in front of the elevator the doors of the elevator were practically closed, there being an opening of three or four inches. Mr. Mulzer did not push the button to ring the bell or buzzer but

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pushed open the doors and without ascertaining that the elevator was at that floor stepped inside the shaft. The elevator was at an upper floor and he fell to the bottom of the pit, sustaining such serious injuries that he died four days later.

FELLOWS, C. J. (*after stating the facts*). We shall not take up each assignment of error. As the case must go back for a new trial we shall dispose of the controlling questions. Plaintiff's right to maintain this action is based upon the statute (2 Comp. Laws 1915, § 5468), which gives such right:

"Where the injury for which compensation is payable under this act was caused under circumstances creating a legal liability in some person other than the employer to pay damages in respect thereof." * * *

This "legal liability" arises where such other person is guilty of negligence, and unless a legal liability for negligence is made out the plaintiff can not recover. *Carlson* v. *Railway Co.*, 143 Minn. 129 (173 N. W. 405); *Fidelity & Casualty Co.* v. *Electric Co.*, 187 Iowa, 1014 (174 N. W. 709); *Thede* v. *Deposit Co.*, 210 Ill. App. 450.

Defendant's counsel insists that the trial judge should have directed a verdict because of the contributory negligence of Mr. Mulzer, and should have granted the motion for judgment *non obstante veredicto* based on this ground. He insists that Mr. Mulzer's negligence was the sole and proximate cause of the accident and that defendant is not liable. Plaintiff's counsel call our attention to cases holding that a wide open elevator door is an invitation to enter. We need not consider them as they are not applicable to the instant case. Plaintiff's testimony conclusively establishes that the elevator doors were nearly closed, were but three or four inches apart, only by opening them could one get in-

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side—for all practical purposes the doors were closed. We are not here dealing with an automatic elevator, one which could be brought to the desired floor by pushing a button; this elevator required human agency to move it; an operator was provided for it, and by simply pushing a button his attention would be attracted and the elevator brought by him to the desired floor. All of this was well known by deceased who had been in the building hundreds of times. Instead of pushing the button deceased himself opened the doors and without ascertaining whether the elevator was there stepped inside the shaft and received the injuries which resulted in his death. Such utter disregard for his own safety, such carelessness and recklessness constituted contributory negligence as matter of law.

In *Bremer* v. *Pleiss*, 121 Wis. 61 (98 N. W. 945), it was said:

"There is no doubt that, when a door to an elevator shaft is thrown open by the attendant, that very act constitutes an invitation to enter. *Tousey* v. *Roberts*, 114 N. Y. 312 (21 N. E. 399); *Oberndorfer* v. *Pabst*, 100 Wis. 505 (76 N. W. 338). So it has been held that, where the door is fully open and the shaft is dark, the question whether a passenger is guilty of contributory negligence in stepping in without examination is one for the jury. *People's Bank* v. *Morgolofski*, 75 Md. 432 (23 Atl. 1027, 32 Am. St. Rep. 403); *Southern Bldg. & Loan Ass'n* v. *Lawson*, 97 Tenn. 367 (37 S. W. 86, 56 Am. St. Rep. 804); *Dawson* v. *Sloan*, 49 N. Y. Sup. Ct. 304, affirmed in 100 N. Y. 620. We have found no case, however, holding that where the door to the shaft is only halfway open, so that the passenger entering is obliged to, and does, open it the rest of the way in order to enter, the question of contributory negligence is a matter of doubt; nor do we see how it could be so held. It seems to us entirely clear that the fact that the door is only partway open is a definite and unequivocal advertisement that something is wrong—certainly not an assurance that the car is there. The use of passenger ele-

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vators is now so universal that all know that when an elevator car is brought to a standstill, ready for passengers to enter or leave, the door is always thrown wide open. A door only halfway open is a plain suggestion of some unusual condition—a hint to investigate, not an invitation to enter or an assurance of safety."

See, also, *Kauffman* v. *Machin Shirt Co.*, 167 Cal. 506 (140 Pac. 15); *Ballou* v. *Collamore*, 160 Mass. 246 (35 N. E. 463); *Wheeler* v. *Hotel Stevens Co.*, 71 Wash. 142 (127 Pac. 840, Ann. Cas. 1914C, 576); *Claypool* v. *Wigmore*, 34 Ind. App. 35 (71 N. E. 509); *Globe Indemnity Co.* v. *Hook* (Cal. App.), 189 Pac. 797; *Massey* v. *Seller*, 45 Ore. 267 (77 Pac. 397); *Hutchins* v. *Sleigh Co.*, 61 Mich. 252.

But plaintiff insists there was a custom prevailing in the building of permitting the tenants and their employees to operate the elevator and of leaving the doors partly open when the elevator was at the ground floor. If there was a custom of leaving the doors of the elevator a few inches open only when the elevator was at the ground floor, if an opening of a few inches in the doors was notice that the elevator was there, if it was an invitation to enter and use the elevator, and this was the established custom and of it defendant had notice, then we think the questions of defendant's negligence and of deceased's contributory negligence become questions for the jury. Bearing in mind the rule that upon defendant's motion for a directed verdict the testimony and legitimate inferences most favorable to plaintiff must be accepted, we can not say that there was *no* testimony of such custom. It was of the most meagre sort. As no motion for a new trial was made, we shall not undertake to weigh it further than to say that it did not establish so notorious a custom as that we can say as matter of law that defendant had notice of it, nor was there testimony of actual notice.

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With reference to the custom defendant's counsel requested the court to charge the jury:

"Even if you find that there was such a custom, unless you find that defendant had notice or knowledge of such custom, your verdict must be for the defendant."

This request was refused and was not given in substance. The substance of this request should have been given. A custom may exist so long as to give constructive notice of it or there may be actual knowledge of its existence. But it must be obvious that defendant can not be held guilty of negligence for the breach of a duty created by a custom of which it has neither actual or constructive notice. *Fluhrer* v. *Railway Co.*, 121 Mich. 212; *Nichols* v. *Railway Co.*, 125 Mich. 394.

By an amendment to its declaration plaintiff counted on sections 5333 and 5595, 2 Comp. Laws 1915, but as the case was not submitted to the jury upon the count charging a breach of statutory duty we do not consider the statutes or their validity.

The judgment will be reversed with a new trial. Defendant will recover costs of this court.

WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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PEOPLE v. WIRTH.

CRIMINAL LAW — MOTOR VEHICLES — STATUTES — CONSTRUCTION — MANUFACTURER'S LICENSE.

In a prosecution for violating the act relating to the registration of motor vehicles (1 Comp. Laws 1915, § 4797 *et seq.*, as amended by Act No. 383, Pub. Acts 1919), evidence that defendant was driving on the public highways a motor truck employed in the private business of his employer, an automobile manufacturer, while displaying thereon the distinctive license number of said employer as a manufacturer instead of a separate license number assigned by the secretary of State, as required by said statute, *held*, sufficient to sustain his conviction.

Error to recorder's court of Detroit; Marsh (Pliny W.), J. Submitted January 17, 1922. (Docket No. 170.) Decided June 5, 1922.

George Wirth was convicted of violating the automobile law. Affirmed.

Philip H. Robinson, for appellant.

Merlin Wiley, Attorney General, *J. E. Converse*, Assistant Attorney General, and *Paul W. Voorhies*, Prosecuting Attorney, for the people.

WIEST, J. Defendant was convicted in the recorder's court for the city of Detroit, under a complaint charging him with unlawfully driving a motor vehicle on a public highway without having license number plates assigned thereto by the secretary of State. Defendant was in the employ of Dodge Brothers, automobile manufacturers, as a motor truck driver, and at the time of his arrest was driving with a load of automobile parts to a freight depot, using a

For authorities discussing the question of validity of license tax on automobiles, see notes in 1 L. R. A. (N. S.) 215; 21 L. R. A. (N. S.) 41; 37 L. R. A. (N. S.) 440; 52 L. R. A. (N. S.) 949; L. R. A. 1915D, 322.

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motor truck manufactured by the Packard Motor Car Company and owned by his employer and had displayed thereon the regular Dodge Brothers manufacturers' license "No. 48-M." The recorder found defendant guilty and fined him $10.

The case is here on writ of error and presents the question of whether a motor truck employed in the conduct of the business by a manufacturer of motor vehicles must have a separate license or comes under the law relating to general distinctive number or numbers assigned to a manufacturer. This calls for a construction of the statute relative to the registration of motor vehicles by manufacturers. The statute (Act No. 302, Pub. Acts 1915 [1 Comp. Laws 1915, § 4797 *et seq.*], as amended by Act No. 383, Pub. Acts 1919), provides for an application to the secretary of State for the registration of motor vehicles and the assigning of a distinctive number to each vehicle and the furnishing of a number plate, and:

"No person shall operate or drive a motor vehicle on the public highways of this State, unless such vehicle shall have the number plates assigned to it by the secretary of State conspicuously displayed." * * *

Section 13 relates to registration by manufacturers and dealers:

"Every person, firm, association or corporation manufacturing or dealing in motor vehicles may, instead of registering each motor vehicle so manufactured or dealt in, make an application upon a blank to be furnished by the secretary of State for a general distinctive number or numbers for all the motor vehicles owned or controlled by such manufacturer or dealer. Such application shall be accompanied by an affidavit setting forth the truth of the facts therein alleged and shall contain:

"(*a*) A statement setting forth whether the applicant be a dealer or manufacturer;

"(*b*) The name, residence and business address of such manufacturer or dealer. * * *

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"There shall thereupon be assigned and issued to such manufacturer or dealer a general distinctive number or numbers and duplicate number plates in the manner provided by section four which shall be in the form of plates as provided in section twelve, duplicates of which shall be carried or displayed by every motor vehicle of such manufacturer or dealer so registered when the same is driven or operated on the public highways. Such manufacturer or dealer may obtain as many duplicate sets of such number plates as may be desired upon payment to the secretary of State of ten dollars for each duplicate set in excess of the first three issued with the license. Nothing in this section shall be construed to apply to a motor vehicle operated by a manufacturer or dealer for private use or for hire, and the operation on the public highways of this State for private use or for hire of any motor vehicle under a manufacturer's or dealer's license, and with the number plates assigned to any manufacturer or dealer displayed thereon, shall be deemed to constitute a violation of the provisions of this act. * * * No provision in this section shall be construed to apply to a motor vehicle operated by a manufacturer or his authorized representative between the factory where such motor vehicle is manufactured and any railroad depot, railroad siding, warehouse, steamship dock, or other place where such motor vehicle is to be delivered for shipment, or to the warehouse or salesroom of such manufacturer; *Provided,* That the person so operating a motor vehicle under the provisions of this section shall be a registered chauffeur under the terms hereof and shall be furnished by the manufacturer or his authorized agent with an order for the delivery of such motor vehicle to its destination, which order shall bear the date upon which it is issued and shall contain the number of the motor vehicle so operated and the point to which it is to be delivered: *Provided further,* That any such motor vehicle sold by the manufacturer or dealer may be driven by a registered chauffeur under its own motor power on any of the public highways of this State from the factory or place of business to the place of residence of the purchaser." * * *

Defendant claims the truck he was driving falls

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within the provision of the statute permitting a general distinctive number for all motor vehicles owned or controlled by Dodge Brothers. With this we cannot agree. The motor truck he was driving was employed in the conduct of the business of Dodge Brothers. The statute relates to motor vehicles manufactured by any person or company, and the shipment, delivery, demonstration and operation thereof in the course of sale upon highways. A motor truck employed in the conduct of the business, whether purchased from another maker or made by the company so devoting the same to purely commercial purposes, such as the trucking business of the company, does not fall within the permitted registration of motor vehicles by manufacturers. Such use is in its very nature a private one, and clearly outside of permitted operation upon the public highways of the motor vehicles manufactured by the company. Nothing in other sections of the statute militates against this view. The law does not admit of manufacturers operating motor trucks upon the highways, in the general conduct of the business of the factory, under a manufacturer's number.

Every manufacturer of motor vehicles "may, instead of registering each motor vehicle so manufactured," make application for and obtain "a general distinctive number or numbers for all motor vehicles owned or controlled by such manufacturer," but may not employ motor vehicles under such number or numbers upon the highways in the industrial conduct of the business of the company.

The truck so driven by the defendant required a separate license.

The conviction is affirmed.

FELLOWS, C. J., and CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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KUCHENMEISTER *v.* DUSZA.

ASSUMPSIT—MONEY HAD AND RECEIVED—COMMON COUNTS WILL SUPPORT ACTION FOR MONEY PAID UNDER VOID CONTRACT.

In an action under the common counts for money had and received, the trial court was in error in directing a verdict for defendant on the ground that plaintiff could not recover because the agreement under which he paid the money to defendant was void, since the common counts in assumpsit are equitable in their nature and will support a recovery in such case.

Error to Macomb; Black (Edward D.), J., presiding. Submitted January 11, 1922. (Docket No. 86.) Decided June 5, 1922.

Assumpsit in justice's court by Albert Kuchenmeister against Marcel J. Dusza for money had and received. There was judgment for plaintiff, and defendant appealed to the circuit court. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

Lungerhausen, Weeks & Lungerhausen, for appellant.

B. V. Nunneley, for appellee.

WIEST, J. This suit was commenced in justice's court, and upon appeal the parties filed formal pleadings in the circuit court. Plaintiff declared upon an agreement under which the commission he was to earn in making a sale of a certain farm and the commission defendant was to earn from the purchaser of the farm should be equally divided between them; that

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he paid defendant $100, the half of his commission, and defendant refused to pay him $100, the half of his commission. The declaration also contained the common count for money had and received. Defendant pleaded the general issue and gave notice that, the agreement not being in writing, and relating to commissions for the sale of real estate, was void.

The learned circuit judge directed a verdict for defendant, stating that:

"This action is brought to recover the money so paid, as I understand it, instead of enforcing the contract. * * *

"Under the statutes of the State of Michigan, the contract between the plaintiff and defendant was a void contract. It could not have been enforced by either party but the plaintiff pays to the defendant one-half of the commission where there was no law violation on his part in so doing. That the defendant has paid no part of the commission he received, if he received any, to the plaintiff.

"The court holds the plaintiff having voluntarily paid to the defendant one-half of his commission, he cannot recover in any action at law for the money so paid for the reason that under the Supreme Court decisions and the construction of the law relative to commissions for the sale of real estate he voluntarily parted with his money."

The case is here upon writ of error. Conceding the agreement to have been void for the reason stated in *Smith* v. *Starke*, 196 Mich. 311, as claimed by defendant, leaves defendant with $100 "had and received from plaintiff" without consideration. Defendant's refusal to carry out the void contract left it executory. Where a void contract still remains executory money paid under it may be recovered under the count for money had and received.

In *DeCroupet* v. *Frank*, 212 Mich. 465, it was undisputed that the money contributed by plaintiff was

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paid to defendant under an agreement void under the statute, and we said:

"We have many times held that the common counts in assumpsit are equitable in their nature and will support a recovery where money has been paid by plaintiff to defendant under a void contract."

In the case at bar the defendant received money, which, *ex aequo et bono*, he ought to refund, and judgment should have been entered for plaintiff.

The only excuse defendant advanced for not paying the money back to plaintiff was that it was paid to him under a void agreement. That is the very reason why he had no right to the money and can be held under the count for money had and received. *Beardslee* v. *Horton*, 3 Mich. 560; *Walker* v. *Conant*, 65 Mich. 194.

An instructive case upon the subject is *Congress & Empire Spring Co.* v. *Knowlton*, 103 U. S. 49.

The judgment is reversed and a new trial granted, with costs of this court to plaintiff.

FELLOWS, C. J., and CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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FLOWERS *v.* WAYNE CIRCUIT JUDGE.

1. JUDGMENT—VACATING DECREE—REHEARING—MANDAMUS — PRACTICE.

A finding by the circuit judge that an order of a former circuit judge, now deceased, setting aside a decree and ordering a rehearing was obtained *ex parte* in chambers without notice, affidavit, or petition, and upon insufficient grounds for a rehearing, justified an order setting aside said order granting a rehearing under 3 Comp. Laws 1915, § 12139, and therefore mandamus will not issue to compel the vacation of said last order.

2. SAME.

If the decree was settled and signed without notice to counsel, a motion should have been made to set it aside; if it was against the just rights of a party or rendered by reason of a misapprehension of the facts a rehearing should have been applied for.

Mandamus by Charles Flowers and another to compel Charles E. White, acting circuit judge of Wayne county, to set aside an order granting a motion to vacate an order granting a rehearing. Submitted January 24, 1922. (Calendar No. 29,937.) Writ denied June 5, 1922.

William Look and *Monaghan, Crowley, Reilley & Kellogg,* for plaintiffs.

Walter M. Nelson, for defendant.

WIEST, J. In 1908, Charles Flowers was appointed special guardian, in a proceeding under the statute, to sell real estate owned by minors and gave bond with the Massachusetts Bonding & Insurance Company as surety. The real estate was sold, and in November, 1914, a party in interest petitioned the court for an order for the payment of the proceeds. Mr. Flowers

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filed a report and also objected to the petition. Testimony was taken and the matter rested until March 17, 1920, when, without notice to Mr. Flowers or his attorney, Judge Hosmer signed a decree presented by the attorneys for petitioner, holding Mr. Flowers liable in the sum of $2,041, with interest thereon from June 5, 1908. March 30, 1920, Judge Hosmer at the request of the attorney for Mr. Flowers set aside the decree of March 17th and ordered a rehearing. Later on, and after a considerable lapse of time, claimed to be excusable because of want of notice of the order of March 30th, a motion was made to set aside the order granting a rehearing. Judge Hosmer having died, this motion was heard by Judge White, sitting in the Wayne circuit, and he vacated the order granting a rehearing and thereby restored the decree of March 17, 1920. We are asked in this proceeding to direct the vacation of this last order.

If the decree granted by Judge Hosmer was settled and signed without notice to the attorney for Mr. Flowers a motion should have been made to set it aside. If the decree was against the just rights of Mr. Flowers or rendered by reason of a misapprehension of the facts then a rehearing should have been applied for. Judge Hosmer having died, Judge White presiding in the same circuit had authority, under proper showing, to set aside the order made by Judge Hosmer (3 Comp. Laws 1915, § 12139). Judge White found that the order made by Judge Hosmer granting a rehearing was obtained *ex parte* in chambers without notice, affidavit or petition, and upon insufficient grounds for a rehearing and set the same aside.

The record sustains the finding, and the writ prayed for is denied, with costs against plaintiffs.

FELLOWS, C. J., and CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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GOONEN *v.* ANN ARBOR RAILROAD CO.

1. RAILROADS—NEGLIGENCE—GROSS NEGLIGENCE — EVIDENCE — SUFFICIENCY—WEIGHT OF TESTIMONY FOR JURY.

   In an action for personal injuries caused to plaintiff when he was struck at a street crossing by defendant's locomotive, testimony that when plaintiff entered upon the track the engine was 176 feet away, running at the rate of 12 miles an hour, and that plaintiff's foot was caught in the defective planking preventing his escape, *held*, to justify submission to the jury of the question of defendant's gross or subsequent negligence, although there was contradictory testimony to the effect that the engine was only "seven steps" distant when he entered upon the track; the weight of the testimony being for the jury.

2. SAME—GROSS NEGLIGENCE—CONTRIBUTORY NEGLIGENCE.

   If defendant is chargeable with subsequent negligence, the fact that plaintiff's danger arose in the first instance because of his own negligence does not prevent his recovery.

3. SAME—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY.

   It cannot be said, as a matter of law, that plaintiff was guilty of contributory negligence in attempting to walk across a track in front of a train 176 feet distant approaching at the rate of 12 miles an hour.

4. SAME—PLEADING—NEGLIGENCE—DEFECTIVE CROSSING.

   An averment of negligence in the declaration "that the planking between the rails of said tracks was so laid that a pedestrian could have his feet caught between the rails and said planking," *held*, sufficient to aver defective construction of the crossing.

5. SAME—EVIDENCE—INFERENCES.

   Evidence as to said defective crossing, while not positive, and lacking in detail, *held*, sufficient from which the jury might infer defective construction and consequent negligence of defendant.

Error to Washtenaw; Sample (George W.), J. Sub-

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mitted January 5, 1922. (Docket No. 35.) Decided June 5, 1922.

Case by Nicholas Goonen against the Ann Arbor Railroad Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

Cavanaugh & Burke, for appellant.

John D. Thomas, Jacob F. Fahrner and *Carl A. Lehman,* for appellee.

CLARK, J. Plaintiff, an adult deaf-mute, on Hill street crossing in Ann Arbor, in the day time, was struck by a passenger train of defendant and injured. There was no gate or flagman at the crossing which is about 2,000 feet south of the station, from which the train was proceeding at the rate of 12 miles per hour. Counsel agree upon the rate of speed, although the testimony on the subject is not harmonious. Plaintiff was familiar with the locality. He walked along Hill street on the sidewalk which ended some 30 or 40 feet from the track. The intervening space was wet and muddy. He picked his way across, claims to have looked before going upon the track and that in attempting to cross, the crossing being wet and muddy, his foot became fast between a rail and the planking of the crossing and that while so situated he was struck by defendant's train. He testified:

"*Q.* When did you first see the train?
"*A.* When was the track.
"*Q.* When who was on the track?
"*A.* About a one-fourth off the track I was inside, cannot come back. I made one step more to go out, my foot caught and turn back. I saw the about 7 steps long. There was time no to hurt if my foot no caught.

(Intermission for view by jury)

"*Q.* What do you mean by 'about seven steps?'

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"*A.* I mean that after my foot caught I saw the train 7 steps away.

"*Q.* How long was your foot caught before you were hit by the train?

"*A.* About 10 to 14 seconds."

There was testimony of obstruction to the view of the track from a point on the sidewalk, but we find no evidence that the approaching train might not have been clearly seen a distance of several hundred feet from points within the 30 or 40 feet between the track and the end of the sidewalk. The engineer said he had a clear view of the crossing for a distance of 1,000 feet, that he saw plaintiff near the track at the crossing, that when the engine was about 10 feet from the crossing, plaintiff went upon the tracks, that the air brakes and the emergency were at once applied and that he did all he could to avoid injuring plaintiff. The train was stopped within the space of about 75 feet. A witness for plaintiff who saw the accident said that plaintiff went upon the tracks immediately, 10 feet, in front of the train.

An averment of negligence of defendant is defective construction of the crossing: "that the planking between the rails of said tracks was so laid that a pedestrian could have his feet caught between the rails and said planking." Subsequent or discovered negligence is also averred. Defendant offered no evidence, made a motion for a directed verdict that it was not negligent and that plaintiff was guilty of contributory negligence as a matter of law. The trial judge submitted the questions of defendant's negligence, plaintiff's contributory negligence, and defendant's subsequent negligence to the jury. Plaintiff had verdict and judgment for $1,000. Defendant brings error, and presents the three questions above set forth.

Subsequent negligence. As we read this record, plaintiff's testimony is contradictory. In the first

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part of his testimony quoted, plaintiff states that he saw the train when he was entering upon the tracks, "one-fourth off the track" but "inside" and "cannot come back," the train being "7 steps" distant. He then made a step "to go out," out of the danger as we read it, but his foot caught. In the latter part of his testimony quoted, given after the intermission for a view by the jury, he states that his foot was caught 10 to 14 seconds before he was hit by the train. At the rate of 12 miles per hour, the rate would be 17.6 feet per second, and under this part of his testimony therefore the train would be at least 176 feet from him when his foot was caught, and upon such latter testimony alone a question of gross or subsequent negligence appears under the holding in *Fike* v. *Railroad Co.*, 174 Mich. 167, and cases there cited.

But under the testimony of plaintiff, first above quoted, there is no room for the claim of subsequent or gross negligence. Plaintiff's statement that he went upon the tracks but "7 steps" in front of the train is substantially the same as that of the engineer. And plaintiff's witness who saw the accident fixes such distance at 10 feet. Upon a motion to direct a verdict for defendant, the evidence must be viewed in the light most favorable to plaintiff and when so viewed the portion of his testimony sustaining the theory of subsequent negligence made an issue of fact for the jury. It was for the jury to say what weight shall be given to his testimony as a whole. See *Emery* v. *Guarantee Co.*, 209 Mich. 295; *Parnell* v. *Pungs*, 190 Mich. 638; *Piehl* v. *Piehl*, 138 Mich. 515; *Kelly* v. *Freedman*, 56 Mich. 321; *Watson* v. *Watson*, 58 Mich. 507; *People* v. *Hansen*, 183 Mich. 565; *Burtch* v. *Child, Hulswit & Co.*, 207 Mich. 205; *King* v. *Lumber Co.*, 93 Mich. 172; *Pelton* v. *Schmidt*, 104 Mich. 345 (53 Am. St. Rep. 462); *Gardiner* v. *Courtright*, 165 Mich. 54.

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A province of the court is, upon proper motion, to exercise control if in its judgment the verdict is against the great weight of the evidence. *Piehl* v. *Piehl, supra.*

Contributory negligence. If defendant is chargeable with subsequent negligence, the fact that plaintiff's danger arose in the first instance because of his own negligence does not prevent recovery. See *Fike* v. *Railroad Co., supra.* Nor can we say as a matter of law that the plaintiff was negligent in attempting to walk across the track in front of a train, 176 feet distant, approaching at the rate of 12 miles per hour. There being evidence to that effect, this question was properly submitted to the jury.

Defendant's negligence. We think the declaration as quoted averred defective construction of the crossing. The evidence is not positive and is lacking in detail, but we cannot say that from all the evidence the jury might not fairly infer such defect in construction and that defendant was negligent.

The charge taken as a whole fairly and concisely submitted the issues to the jury. That the verdict is against the great weight of the evidence and that the motion for a new trial therefore should have been granted are not discussed in the briefs and therefore are not considered.

Judgment affirmed.

FELLOWS, C. J., and WIEST, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

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VILLAGE OF NORTH ADAMS *v.* WERTZ.

1. HIGHWAYS AND STREETS—DEDICATION BY USER—MUNICIPAL CORPORATIONS.

   A village street used openly, exclusively, and continuously as such by the public for more than 40 years is a public street, of which the village has control under 1 Comp. Laws 1915, § 2646, where the intention to dedicate is shown positively, although the record title is in defendant, adjoining property owner, and there is of record no deed or formal dedication to the village or the public.

2. SAME—PRESCRIPTIVE RIGHTS AGAINST VILLAGE.

   That for much of the time the street was used as such defendant had chairs upon the sidewalk for the convenience of his guests would afford no ground for claiming prescriptive rights as against the village.

3. SAME—CONTROL OF STREETS—FILLING STATION—INJUNCTION.

   Since the village has the control of its streets (1 Comp. Laws 1915, §§ 2646, 2650), and therefore the right to prohibit the installing of gasoline filling stations therein, defendant was properly enjoined from installing a filling station in the main street adjoining his property without permission of the village.

Appeal from Hillsdale, Chester (Guy M.), J. Submitted February 2, 1922. (Docket No. 30.) Decided June 5, 1922.

Bill by the village of North Adams against Clyde S. Wertz to enjoin the installation of a gasoline filling station. From a decree for plaintiff, defendant appeals. Affirmed.

Frankhauser & Cornell (*F. H. Stone* and *F. D. Stone*, of counsel), for plaintiff.

W. D. Grommon and *Merton Fitzpatrick*, for defendant.

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CLARK, J. Plaintiff village had the plan of not permitting gasoline filling stations in its main street, preferring to have all parking space along the street for the convenience of farmers trading at the stores, and of people generally. Defendant proposed to tear up the sidewalk to install a tank and pump and to have the station and conduct the business in and upon the said street and sidewalk in front of his store. The sidewalk there is upon land of which defendant owns the fee, there being of record no deed or formal dedication to the village or the public. It meets the street proper in a curb upon the street line, and it has been used openly, exclusively and continuously as such by the public for upwards of 40 years, though for much of this time, defendant's building being then used as a hotel, chairs were kept on the sidewalk at seasonable times for use by guests. A board walk was replaced by a cement walk paid for in part by the village and in part by the abutter. Plaintiff refused defendant's proposal. He began installing, was enjoined, and has appealed.

Clearly the sidewalk was a public one by user and of which the village had control. Section 2646, 1 Comp. Laws 1915; *Village of Manchester* v. *Clarkson,* 195 Mich. 354, and cases there cited. The intention to dedicate is shown positively. *Vance* v. *Village of Pewamo,* 161 Mich. 528. The having of the chairs upon the sidewalk would afford no ground for claiming prescriptive rights as against the village. *Pastorino* v. *City of Detroit,* 182 Mich. 5 (Ann. Cas. 1916D, 768); *Weber* v. *City of Detroit,* 159 Mich. 14 (36 L. R. A. [N. S.] 1056), and is of no weight as against the clear and unequivocal evidence of dedication. *Campau* v. *City of Detroit,* 104 Mich. 560, and cases there cited. And there has been full and complete acceptance by the village. 18 C. J. p. 90; 11 L. R. A. 55; *Vance* v. *Village of Pewamo, supra.*

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In conformity to its plan the village had the right to refuse and to prohibit the installing of the filling station and the conducting of the business in and upon such public street of which the sidewalk is a part. Sections 2646 and 2650, 1 Comp. Laws 1915; and see *Melconian* v. *City of Grand Rapids, ante,* 397.

We need not determine the interesting question of the right of defendant to permanent use of the subsurface. See 7 A. L. R. 646.

The decree is affirmed.

FELLOWS, C. J., and WIEST, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

The late Justice STONE took no part in this decision.

METZ *v.* CORL'S ESTATE.

PRINCIPAL AND SURETY—GUARANTY—GUARANTOR NOT LIABLE WHERE CONDITION NOT COMPLIED WITH.

Where stock of a certain company was issued to plaintiff redeemable at par on February 1, 1915, and the payment of the principal and dividends at said date was guaranteed by two persons with the condition that if the holder of the stock desired to continue it beyond the maturity date notice to that effect was to be given to them at least 60 days prior to that time, and plaintiff failed to give such notice but continued to hold said stock until August 1, 1916, when all payments stopped because of the bankruptcy of the company, the guarantors were not liable, in an action on their guaranty, because of the failure of the plaintiff to give said notice. FELLOWS, C. J., and MOORE and STEERE, JJ., dissenting.

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Error to Wayne; Webster (Clyde I.), J. Submitted January 4, 1922. (Docket No. 22.) Decided June 5, 1922.

Mary Metz presented a claim against the estate of Samuel S. Corl, deceased, based on a contract of guarantyship. The claim was disallowed by the commissioners, and plaintiff appealed to the circuit court. Judgment for defendant. Plaintiff brings error. Affirmed.

Jacob Steketee (*Goodenough, Voorhies, Long & Ryan, of counsel*), for appellant.

Beaumont, Smith & Harris (*Charles Wright. Jr.*, of counsel), for appellee.

CLARK, J. On January 6, 1903, plaintiff received a certificate for 100 shares of preferred stock, par value of $100 each, of Corl, Knott & Company. A guaranty of payment of principal and dividends was indorsed on the certificate. From time to time shares were redeemed and new certificates issued to plaintiff until finally on August 15, 1907, plaintiff received a certificate for 60 shares of said preferred stock, of the same par value, which certificate provided:

"The company shall call and redeem the preferred stock represented by this certificate, on the first day of February, 1915, by paying to the holder thereof its par value and all accumulated dividends thereon."

And on which certificate a like guaranty was indorsed as follows:

"For value received I hereby guarantee payment of the dividends and principal of within stock. Should the holder thereof desire to continue said stock beyond the maturity therein stated, he or she shall give notice to that effect at least sixty days prior to maturity to the undersigned.

"SAMUEL S. CORL,
"HEBER A. KNOTT."

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Dividends on such stock were paid and were received by plaintiff semi-annually to and including August 1, 1916, but not afterward.

The company did not redeem the stock. Prior to February 1, 1915, and prior to December 16, 1916, no demand that it redeem was made by plaintiff upon the company. No notice was given by plaintiff or anyone in her behalf to the guarantors or either of them prior to February 1, 1915, nor prior to December 16, 1916, that there had been no redemption or that plaintiff desired to continue the stock beyond maturity. The company failed. Its affairs were wound up. Plaintiff has received nothing upon her stock since August, 1916. No demand for payment under the guaranty was made upon Corl during his lifetime.

A claim upon the guaranty was filed against the estate of Corl in the probate court for Wayne county and was disallowed September 13, 1920. The cause was appealed. There was judgment for the estate which plaintiff reviews on error. The trial judge said in an opinion filed:

"Guarantors have the right to impose any conditions or restrictions upon their guaranty that they see fit. Samuel S. Corl and Heber A. Knott guaranteed the payment of this stock to the claimant at maturity and that is all they did do. They did not unconditionally forever guarantee the payment of the principal of this stock, as they would have done if they had stopped at the end of the first sentence, but they go on and make this guaranty conditional, if the holder should desire to keep the stock beyond the maturity date, by providing that she shall give them sixty days' notice. That was inserted for the very purpose of limiting their guaranty. * * *

"On account of this great length of time beyond the maturity date of the stock before plaintiff took any steps to collect either from the company or from the guarantors, the question of laches might be one to be considered if this was an unconditional guaranty. It is my opinion, however, that this guaranty was con-

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ditional and limited as to time and only ran until the maturity date of the stock. When the claimant did not give the sixty days' notice provided for, and elected to hold and retain the stock beyond the maturity date, she, by that action of hers, released the guarantors from any further liability and elected to look to the company * * * for the payment of the stock."

Plaintiff contends that the condition of the guaranty is of no importance and should be held to be of no avail to defendant. But we think the rule as to that is well stated in 20 Cyc. p. 1447, under the subject of guaranty:

"The court will not dispense with that which the parties have agreed upon, or declare that to be immaterial which they have thought of sufficient importance to condition their contract upon." * * *

Nor do we find a waiver of the condition by the guarantors. We think the quoted opinion of the circuit judge is sustained by the weight of authority. See 20 Cyc. pp. 1438, 1472; 1 Brandt on Suretyship and Guaranty (3d Ed.), § 106; *Columbus Sewer Pipe Co.* v. *Ganser*, 58 Mich. 385 (55 Am. Rep. 697); *Gard* v. *Stevens*, 12 Mich. 292 (86 Am. Dec. 52); *Grasser & Brand Brewing Co.* v. *Rogers*, 112 Mich. 112 (67 Am. St. Rep. 389); *Evansville Nat. Bank* v. *Kaufmann*, 93 N. Y. 273 (45 Am. Rep. 204); *Locke* v. *McVean*, 33 Mich. 473, 479; *Mathews* v. *Garman*, 110 Mich. 559, 560; *Morris & Co.* v. *Lucker*, 158 Mich. 518, 520; *Schoonover* v. *Osborne*, 108 Iowa, 453 (79 N. W. 263); *Schwab* v. *Bridge*, 27 Cal. App. 204 (149 Pac. 603).

Judgment affirmed.

WIEST, BIRD, and SHARPE, JJ., concurred with CLARK, J.

FELLOWS, C. J. (*dissenting*). I do not agree that the facts in the instant case bring it within the rules of law thought applicable by my Brother CLARK. By

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the provision of the certificate of stock the company agreed to redeem the stock February 1, 1915, *i. e.*, the company agreed to pay the holder the par value of the stock on that date. Corl and Knott guaranteed the performance of this contract and it was agreed that if the holder desired to extend the stock (not the guaranty) beyond the date mentioned he or she should give notice 60 days before such date. Patently to my mind this meant that if the holder desired to extend the stock, have it continued, keep it, 60 days' notice should be given; if the holder did not desire to keep the stock, to extend it, but wanted the money no notice was to be given. Plaintiff, the holder, gave no notice. She was, therefore, entitled to her money on February 1, 1915, and on the failure of the company to perform its contract her right of action against Corl and Knott then accrued. The only way pointed out by the agreement of the parties whereby the stock could be extended was by giving notice 60 days before the stock matured. Plaintiff did not give such notice, the stock was not extended, and Corl and Knott were not relieved from liability by an extension. Plaintiff was not required to give notice to hold the guarantors, but was to give notice only if she desired that the stock be extended. If plaintiff wanted her money and wanted to hold the guarantors to their contract she had but to remain silent. This she did. To my mind the case can not be distinguished from, but is controlled by, *Roberts* v. *Hawkins*, 70 Mich. 566. In that case, as in this, the guaranty was of payment; like this case interest was paid by the party primarily liable after the maturity of the obligation, and no notice was given the guarantor; likewise there, as here, the party primarily liable had become insolvent before the action was brought. It was there said:

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"The position, however, of a guarantor of payment, as between him and the maker of the note, is that of a surety. It is a common-law contract, and not a contract known to the law-merchant. It is an absolute promise to pay if the maker does not pay, and the right of action accrues against the guarantor at the moment the maker fails to pay. The guarantor would not be discharged by any neglect or even refusal on the part of the holder of the note to prosecute the principal, even if the maker was solvent at the maturity of the note, and subsequently became insolvent; and the fact that no notice of non-payment was given the guarantor at the maturity of the note, or at any time before bringing suit, would not affect the rights of the holder of the note against the guarantor. The guarantor's remedy was to have paid the note, and taken it up, and himself proceeded against the maker."

I think the judgment should be reversed, with a new trial and with costs to plaintiff.

MOORE and STEERE, JJ., concurred with FELLOWS, C. J.

The late Justice STONE took no part in this decision.

AXFORD *v.* DETROIT UNITED RAILWAY.

STREET RAILWAYS—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE—QUESTION FOR JURY.

In an action for damages to plaintiff's automobile caused by being struck by one of defendant's cars, where it appears that when plaintiff drove out of his yard in the morning defendant's workmen had the plank crossing in

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On driving across street railway where view of approaching car is obstructed, as contributory negligence, see note in 32 L. R. A. (N. S.) 266.

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front of plaintiff's premises torn up for repair, that he used a crossing a little to the north, that when he returned in the evening, nearly dark, the northerly crossing was torn out and the one opposite his premises was smooth and had the appearance of being finished, but when he got onto it he discovered one piece of planking was out, and his car stalled and was struck before he could get it out, it cannot be said that plaintiff was guilty of contributory negligence, as a matter of law.

Error to Oakland; Rockwell (Kleber P.), J. Submitted April 28, 1922. (Docket No. 1.) Decided June 5, 1922.

Case by Samuel C. Axford against the Detroit United Railway for damages to plaintiff's automobile. Judgment for plaintiff. Defendant brings error. Affirmed.

James H. Lynch, for appellant.

Earl L. Phillips, for appellee.

BIRD, J. Market street, in the village of Orion, extends north and south. Plaintiff lives on the west side of Market street. Defendant constructed its double track line on the westerly side of Market street in front of plaintiff's house, and at the same time constructed a planked crossing 16 feet wide over its tracks, so that plaintiff could drive from the street onto his own premises. On May 31, 1916, defendant's servants were repairing this planked crossing. When plaintiff drove out of his yard in the morning with his automobile to go to his farm he used the planked crossing a little to the north of the one in question. When he returned at night this crossing was also torn up so he passed on to his own crossing. Before driving onto the east track he looked and saw that the crossing had been smoothed down and had the appear-

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ance of having been repaired. When he got onto it, and before he had passed the "devil's strip," he discovered one piece of planking, 8 feet long, was out from between the rails of the west track. He directed his front wheels away from the hole, but his rear ones dropped into it, and at the same time his front wheels ran up onto a pile of rubbish left near the traveled way and his machine stalled. Coincident with this, one of defendant's freight cars came around the curve just north of his place and ran into and badly damaged his automobile. It cost plaintiff $234 to get it repaired and he recovered this sum in the Oakland circuit court.

The sole question raised by defendant is the failure of the trial court to direct a verdict for defendant on the ground that plaintiff was guilty of contributory negligence, as a matter of law. Defendant argues that plaintiff was familiar with the situation; that he knew that repairs were being made at his crossing, and had he looked as he should before going onto the track, he would have avoided the hole and the collision. The plaintiff replies that while he knew repairs were going on it was nearly night and the crossing had the appearance of having been finished, or, at least, smoothed down. That the crossing he went over in the morning was torn up and he had no other way to reach his premises. That he looked as he was driving on the east track, but did not discover it until he had got onto the track; that when he did discover it it was too late to stop his automobile. That he looked to the south and also to the north before driving on to see if a car was approaching. He could see only three or four rods to the north because the track turned abruptly to the west, and the bend was skirted with willow trees whose branches extended out to the track, which interfered with his view, and that the car came around the bend from the north and collided

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with his car without giving any warning of its approach.

The conduct of plaintiff on this occasion must be measured by what the ordinarily prudent man would do under like circumstances. Taking plaintiff's conduct in its entirety and the considerations which influenced it, the court cannot say it was, as a matter of law, negligent. He was approaching, and attempting to get onto his premises, in the only way that was open. It was night, or nearly so. The crossing had been smoothed off and had the appearance of being finished. Whether, under these and all the other circumstances, he should have observed the missing plank and the approaching car, are questions involving many considerations. We think the trial court rightly determined that the question of plaintiff's negligence was one for the jury.

The judgment is affirmed.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, SHARPE, MOORE, and STEERE, JJ., concurred.

PEOPLE v. MINCHELLA.

1. CRIMINAL LAW—EVIDENCE—SELF-SERVING STATEMENTS—FALSITY—ADMISSIBILITY.

   Self-serving statements made by or for the accused out of court, explaining suspicious circumstances, may be proved against him, and their falsity may be shown; the fact of their falsity admitting them as indicating an attempt

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to explain away incriminating circumstances by falsehoods.

2. SAME—BURGLARY.
In a prosecution for burglary, a conversation between defendant and the police justice, in which defendant claimed that he could not have been at the scene of the crime at the time charged because he was in Detroit that day and voted, and that he finally admitted to the judge that he was lying, *held*, properly admitted.

3. SAME—ADMISSIBILITY NOT DEPENDENT UPON FALSITY.
The admissibility of said self-serving statement, *held*, not to depend upon its falsity.

4. SAME—ADMISSIBILITY NOT DEPENDENT UPON DEFENDANT'S TAKING THE STAND.
The fact that defendant did not take the stand in his own behalf would not make said statement inadmissible.

5. SAME—EVIDENCE—PUBLIC RECORDS—ABSENCE OF RECORD—PAROL TESTIMONY—ADMISSIBILITY.
Testimony by the sheriff that he had examined the poll lists at the precinct in Detroit where defendant stated he had voted on the day in question, and that the records did not show that defendant had voted as he represented, *held*, not open to the objection that said testimony was inadmissible as parol testimony of the contents of a public record, since the witness did not testify as to the contents of a record but of the want of any record.

6. SAME—EVIDENCE—CIRCUMSTANTIAL EVIDENCE—SUFFICIENCY.
Although the testimony against defendant was largely circumstantial, it is *held*, sufficient to justify the trial court in refusing to direct a verdict in his favor.

Exceptions before judgment from St. Clair; Tappan (Harvey), J. Submitted April 13, 1922. (Docket No. 116.) Decided June 5, 1922.

Charles Minchella was convicted of burglary. Affirmed.

Burt D. Cady, for appellant.

Henry R. Baird, Prosecuting Attorney, for the people.

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BIRD, J. Defendant, a young man 24 years of age, who resided in the city of Detroit, was informed against in St. Clair county for having burglarized the Jeddo elevator on November 2, 1920. He was not sworn in his own behalf, but was convicted, and the case is here on exceptions before sentence.

1. Complaint is made because the trial court admitted a conversation between defendant and Clair R. Black, police justice of the city of Port Huron. The conversation was to the effect that, after defendant was arraigned before him, he requested an interview. In this interview defendant stated that he could not have been at Jeddo at the time charged because he was in Detroit and voted on November 2d, that being presidential election day. The police justice questioned defendant at some length as to the names on the ballots, the color of the ballots, whether he signed his name, and in what precinct he voted. Defendant's answers led the police justice to charge him with lying, and he advised him his reasons for so thinking. Defendant finally admitted to the judge that he was lying. Counsel claims that this conversation was improperly admitted and was very harmful to defendant's case.

The rule regulating the admission of this class of testimony is stated, as follows:

"Self-serving statements made by or for the accused out of court, explaining suspicious circumstances, may be proved against him, and their falsity may then be shown. The fact of their falsity admits them as indicating an attempt to explain away incriminating circumstances by falsehoods." 12 Cyc. p. 429.

This rule has been applied in many cases in this court. A good example is the case of *People* v. *Arnold*, 43 Mich. 303 (38 Am. Rep. 182). In this case the defendant had two trials. At the first trial he was a witness and upon the second trial his testi-

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mony on the first trial was offered and admitted against his objection. The case afterwards came to this court, and in determining it it was said in part:

"It cannot be claimed with any reason that giving in evidence the defendant's statement violates any privilege which the statute confers upon him. He gives evidence in this manner on his own behalf at his option, and is not to be subjected to unfavorable inferences because he withholds it. But when it is in, it is to be treated like any other evidence, and may be contradicted and shown to be false. Defendant has no claim to be protected against the exposure of this falsehood where he indulges in it for his own exculpation. He runs the risk of this exposure when he invents a false defense.

"The peculiarity of this case consists in the defendant's statement being put in on the second trial, not by the defendant himself but by the prosecution. It is not, therefore, evidence in the case except as the prosecution makes it so, and the prosecution puts it in, not that reliance may be placed upon it, but for the very purpose of showing its falsity. It is proved as a declaration of the prisoner that it may be followed by evidence that he has attempted to deceive and mislead by it. And the question is whether from the statement itself, or from the use which was made of it, inferences unfavorable to the prisoner's innocence might rightly be drawn."

There is much more of this opinion and it is very much in point with the question involved here. In the case under consideration it does not consist alone of a self-serving statement of the defendant, but consists of a self-serving statement followed by his subsequent admission that it was not true. This, however, would not, in my judgment, lessen its admissibility. Some of the other cases in which the rule has been applied are *People* v. *Eaton,* 59 Mich. 559, and *People* v. *Hoffmann,* 142 Mich. 531.

Counsel, however, does not find so much fault with the rule as he does with its application under the

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circumstances. The fact that defendant did not take the stand counsel insists the prosecution had no right to introduce it as affirmative proof of guilt. The statement of defendant and his subsequent denial were admissible as affirmative proof. The fact that he did not testify in his own behalf would not make the statement inadmissible under the rule laid down in *People* v. *Arnold, supra.* In that case the defendant had two trials. Upon the first trial he testified. Upon the second one he did not, but the court held that his statement upon the first trial was admissible. This authority determines the particular point made by counsel adversely to his contention.

2. The sheriff was permitted to testify that he had examined the poll lists at the precinct in Detroit where defendant stated he had voted on the day in question, and that the records did not show that defendant had voted as he represented. This is complained of on the ground that parol testimony of the contents of a public record is inadmissible. The testimony given by the sheriff does not violate this rule for the reason that he did not testify as to the contents of a record but of the want of any record. This distinction was recognized in *Maxwell* v. *Paine,* 53 Mich. 30.

3. It is insisted the proofs did not make a case for the jury and that the trial court was in error in refusing to control the verdict. It was shown, in substance, that a Cadillac Victoria automobile had been stolen from Dr. Fruend in Detroit. A Cadillac Victoria was seen in the neighborhood of the elevator in question, and opinion evidence was given by witnesses that defendant resembled the driver of the car. Later the car was found in Detroit and in it was found the adding machine which had been stolen from the elevator. It was also shown that the tracks made by the tires of the car were similar to those made by the car at the elevator. One rear tire was new

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and the other was old. These and other less important facts were relied upon by the prosecution for conviction. While the testimony was largely circumstantial we think it furnished a basis for the inference drawn by the jury that defendant was the occupant of the car while it was at Jeddo, and that he was the party who broke into the elevator. We do not think the trial court was in error in refusing to control the verdict. Other assignments are argued, but we see no occasion to consider them.

The judgment of conviction is affirmed.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, SHARPE, MOORE, and STEERE, JJ., concurred.

STEELE *v.* HAMILTON.

NEGLIGENCE—PERSONAL INJURIES—CONTRIBUTORY NEGLIGENCE.

In an action for personal injuries caused to plaintiff at a street intersection by defendant's automobile, where a reading of the record is convincing that plaintiff was unmindful of her surroundings in a busy section of the city, that she failed to use the care that should have been exercised by an ordinarily prudent person, and was therefore guilty of contributory negligence, the judgment in her favor will be reversed. CLARK and MOORE, JJ., dissenting.

Error to Wayne; Goff (John H.), J. Submitted April 5, 1922. (Docket No. 10.) Decided June 5, 1922.

On duty of pedestrian to look out for automobiles, see notes in 3 L. R. A. (N. S.) 345; 20 L. R. A. (N. S.) 232; 38 L. R. A. (N. S.) 488; 42 L. R. A. (N. S.) 1179.

On duty of pedestrian before crossing street to look for vehicles approaching on intersecting street, see note in 9 A. L. R. 1248.

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Case by Alice Steele against James Hamilton for personal injuries. Judgment for plaintiff. Defendant brings error. Reversed.

Walter M. Nelson, for appellant.

Clarence P. Milligan, for appellee.

BIRD, J. Plaintiff recovered a judgment for $500 against defendant in the Wayne circuit court for having run his automobile into her as she was attempting to cross Lafayette street. Counsel contends that defendant should have had a directed verdict because of plaintiff's failure to show his negligence, and upon the further ground that she herself was guilty of negligence. Under our view of the case it will be necessary to discuss only the latter contention.

The accident happened at or near the intersection of Griswold and Lafayette streets, in the city of Detroit. Griswold street extends north and south. Lafayette extends east and west, and its eastern terminus is Griswold street. Plaintiff, on the day in question, was proceeding north on the west side of Griswold street. When she reached the south curb of Lafayette, she claims she looked for approaching vehicles but saw none, and also observed that the semaphore was turned against east and west traffic. She started across, and when about 20 feet from the south curb she was struck by defendant's automobile and thrown to the pavement and dragged for a short distance. As a result her clothing was badly torn and she was bruised more or less, but not otherwise seriously injured.

Plaintiff was of the opinion that she was struck by the side of the automobile. She was confused at the time and her memory of just how the accident happened appeared to be somewhat hazy. A pedestrian by the name of Curtis, who was traveling in the same

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direction, and was at her left, gives a very clear account as to what happened. He says he was traveling north on Griswold street and when he reached Lafayette street he was at her left; that he saw the car and waited for it to pass and saw it strike her. That she was struck by that part of the car where the fender joins the running board. That when the collision took place she was thrown to the pavement. That he went to her aid and assisted her in getting up and helped to arrange for sending her home. No one else appears to have seen just what happened except the defendant.

It is exceedingly difficult to read the record evidence of this accident and avoid the conclusion that plaintiff was unmindful of her surroundings and ran into the automobile. It is obvious that the car occupied that part of the street immediately in front of her before she did, and had she been making the use of her eyes that most people do when traveling in a busy section of the city, she would have seen the car in season to have stopped before it struck her. Had she been struck by the front of the machine there would be room for her to contend that she occupied the street first but could not avoid the on-coming car, but when she was struck by the side of the car no such contention can reasonably be made. There is some conflict in the testimony as to whether the semaphore was turned against the east and west traffic, but if we concede that it was, that fact did not wholly relieve plaintiff of exercising ordinary care and using her eyes in the ordinary way to protect herself from collisions. We are of the opinion that the evidence, as it appears in the record, was such that the trial court should have directed a verdict for the defendant on the ground that plaintiff herself was guilty of negligence, as a matter of law.

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The judgment is reversed and a new trial granted. Defendant will recover his costs.

FELLOWS, C. J., and WIEST, MCDONALD, SHARPE, and STEERE, JJ., concurred.

MOORE, J. (*dissenting*). I think the case presented a question of fact which was properly submitted and should be affirmed.

CLARK, J., concurred with MOORE, J.

PEOPLE v. HUNTER.

1. CRIMINAL LAW—ASSAULT WITH INTENT TO RAPE—EVIDENCE—ADMISSIBILITY—OTHER OFFENSES.

   In a prosecution for assault with intent to commit rape, testimony that on the day of the commission of the offense charged defendant attempted to fuss with or take advantage of a young girl, *held*, inadmissible.

2. SAME—TRIAL—CONDUCT OF PROSECUTOR.

   The action of the prosecutor in asking a witness, after she had testified that she knew defendant and that he had dinner at her home on the day in question, whether anything occurred that day with reference to her daughter, *held*, reversible error, although the question was not answered, since the question was well calculated to, and probably did, prejudice the defendant in the minds of the jury.

3. SAME—ARGUMENT OF PROSECUTOR—FAILURE TO CALL WITNESS SUBJECT TO COMMENT.

   Where defendant had testified to being with certain per-

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sons on the day in question, comment by the prosecutor, in his argument to the jury, on defendant's failure to produce said persons as witnesses to corroborate his story, *held*, not error.

4. SAME.

The provisions of the statute (3 Comp. Laws 1915, § 12552) protecting defendant from comment or criticism for not taking the witness stand in his own behalf is not extended to other witnesses who may know facts which would be helpful to defendant in making his defense, and his failure to produce them, if competent and within reach, is properly the subject of comment by the prosecutor.

Exceptions before judgment from Muskegon; Vanderwerp (John), J. Submitted April 14, 1922. (Docket No. 127.) Decided June 5, 1922.

Sanford Hunter was convicted of an assault with intent to commit rape. Reversed.

Willard J. Turner, for appellant.

Merlin Wiley, Attorney General, *Harry W. Jackson*, Prosecuting Attorney, and *R. Glen Dunn*, Assistant Prosecuting Attorney, for the people.

BIRD, J. Defendant was tried and convicted of the offense of assault with intent to commit rape on one Margaret Johnson, a young married woman, living in the township of Moorland, Muskegon county. The complaining witness testified that defendant called at her house and found her husband away from home. They talked at the door a moment, when defendant asked to see her young baby. He went in, grabbed her and tried to kiss her, and later to have intercourse with her. Defendant concedes he was at the house and that he made some advances which, as he thought, were apparently well received, but he insists that, when she objected to his going farther, he desisted.

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1. Mrs. Sarah Ardeline was sworn as a witness for the people. After testifying that she knew defendant and that he had dinner at her home on the day in question, the prosecutor asked her the following question:

"*Q.* Was there anything occurred there at your house that day with reference to this daughter of yours?

"*Mr. Turner:* Now, wait a minute.

"*A.* I am not on Mr. Johnson's trial.

"*Q.* I object to this as improper.

"*Mr. Jackson:* If the court please, we are handicapped with the jury present."

Whereupon the court excused the jury and the matter was discussed by counsel. The jury was then called back and the witness excused, and no comment was made by the court. It is urged that this was error, even though the question was left unanswered. We are inclined to agree with this contention. Keeping in mind that defendant was on trial for attempted rape the question was a live wire which went directly to defendant's proneness in such affairs. The question was well calculated to, and probably did, leave in the minds of the jurors the impression that the prosecutor had knowledge that defendant had made an effort on the same day to fuss with or take advantage of her young daughter. Even though there were some basis for believing that defendant had done so, the fact was not admissible to show the guilt of defendant under the charge on which he was being tried. It was an attempt to make evidence of a distinct and similar offense. It is true, the question was not answered, but it was one of those questions which, coming from a public prosecutor, had its weight, and would ordinarily leave a strong impression upon a jury. The question was improper, inadmissible and harmful to defendant.

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2. The following portion of the prosecutor's argument is complained of as error:

"If this man's story is true, let me ask you where is this man, Lane? He lives in that county; he lives out there by Ravenna. He told you where he lived. He told you about the times that Lane went with him. Where is he?

"*Mr. Turner:* I desire to take an exception to this line of argument as being improper.

"*The Court:* The exception will be noted.

"*Mr. Jackson:* Where is the man that was with him that day? He could have brought him in here to corroborate him. He tells you all about him. Where is he? Where is Doc Willette?

"*Mr. Turner:* I desire, if the court please, to take an exception to that line of argument, it has nothing to do with this case whatever.

"*The Court:* All right.

"*Mr. Jackson:* Could they put a dollar mark on your wife's honor? Could they? Could anybody stamp an 'S' with two big, long lines through it, on your wife's honor, or on your honor? I will say they couldn't. I've got a picture of what this man here, who made that same argument here, would do if the same thing happened in his home, or in his daughter's home, or in any one of his three children's home.

"*Mr. Turner:* I take an exception to that argument as not proper argument, it has been passed upon by the Supreme Court.

"*The Court:* Proceed."

The first complaint is that it was error to criticize defendant for not producing Lane and Dr. Willette. I am not impressed that this was error. A question akin to this was discussed in *People* v. *Schultz,* 210 Mich. 297. The argument of the prosecutor was held error in that case, but I think it must be said to have been on the ground that the witnesses referred to were jointly indicted with defendant, although they were not being tried with him. The statute, 3 Comp. Laws 1915, § 12552, protects the defendant from comment or criticism for not taking the witness stand, but the

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protection is not extended to witnesses. If a witness knows facts which will be helpful to defendant in making his defense, and he is competent and within the reach of defendant, his failure to produce him ought properly to be a subject of comment by the prosecutor. 12 Cyc. p. 578.

The other complaint is directed against the argument of the prosecutor, placing the wives or daughters of the jury in place of the complaining witness, etc. We think this line of argument was considered and condemned in *People* v. *Eamaus*, 207 Mich. 442.

For the errors noted the judgment must be reversed and a new trial ordered.

WIEST, MCDONALD, CLARK, and STEERE, JJ., concurred.

FELLOWS, C. J., and SHARPE and MOORE, JJ., concurred in the result.

PEOPLE v. SALISBURY.

1. CRIMINAL LAW—RAPE—EVIDENCE—HUSBAND AND WIFE—ADMISSIBILITY OF STATEMENT BY WIFE—WITNESSES.

In a prosecution for attempted rape, the action of the prosecutor in calling defendant's attention to a paper containing a statement made by his wife and asking him if he did not make the admissions to her contained therein, was reversible error under 3 Comp. Laws 1915, § 12555, providing that neither spouse may testify as to any communication made by one to the other without the consent of both, since the prosecutor's action was but an attempt to get before the jury in an indirect way testimony made incompetent by the statute.

Authorities discussing the question as to whether a wife can be a witness against husband in prosecution for rape, are collated in notes in 2 L. R. A. (N. S.) 862; 22 L. R. A. (N. S.) 240; 41 L. R. A. (N. S.) 1213; L. R. A. 1917E, 1133.

As to sexual offense by one spouse with or against third person as a crime against other spouse within statute relating to competency of husband or wife as witness against other see note in 4 A. L. R. 1071.

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2. SAME—EVIDENCE—SUFFICIENCY—QUESTION FOR JURY.
Evidence as to defendant's guilt, *held*, sufficient to present an issue of fact for the jury.

3. SAME—TRIAL—INSTRUCTIONS—REQUESTED INSTRUCTIONS — GOOD CHARACTER.
Modification by the court of a requested instruction as to good reputation to make it more applicable to the testimony in the case and the claims of defendant, *held*, not error.

4. SAME—WITNESSES—HUSBAND MAY NOT BE CROSS-EXAMINED AS TO COMMUNICATION TO WIFE.
A defendant in a criminal case may not be cross-examined as to confidential communications made by him to his wife relative to the charge against him.

Exceptions before judgment from Jackson; Parkinson (James A.), J. Submitted April 13, 1922. (Docket No. 117.) Decided June 5, 1922.

Robert Salisbury was convicted of an assault with intent to commit rape. Reversed.

John F. Henigan, for appellant.

M. Grove Hatch, Prosecuting Attorney, and *Arthur W. Wiggins*, Assistant Prosecuting Attorney, for the people.

SHARPE, J. On exceptions before sentence defendant reviews his conviction of assault with intent to commit the crime of rape upon his 14-year-old daughter, Blanche. The testimony offered by the prosecution tended to prove the commission of the crime at his home in Michigan Center, in Jackson county, on the night of July 2, 1921. The defendant was called as a witness on his own behalf. He was cross-examined at length, without objection, as to statements in the nature of admissions claimed to have been made by him to his wife soon thereafter, all of which he denied. The following then occurred:

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"Q. I want you to look at the heading of this paper. (Stepping to witness stand and showing witness a paper.) Just look at it. See what it is. You see what it is do you?

"A. Yes, sir.

"*Mr. Henigan:* What is it? What paper is it?

"*Mr. Hatch:* The statement of Mrs. Robert Salisbury, his wife.

"*Mr. Henigan:* I object to that, your honor, to his using the statement of Mrs. Robert Salisbury, this man's wife, here in evidence.

"*Mr. Hatch:* I am not. I am asking if he didn't say this to her. I called his attention to it, and Mr. Henigan asked me what the statement was.

"*Mr. Henigan:* And you told me.

"*Mr. Hatch:* I want to call this witness' attention to this specific—

"*The Court:* I know, but that is bringing into the case a statement made by her.

"*Mr. Hatch:* I am asking if he didn't say that to her and she didn't say that to him.

"*The Court:* If she said it to him?

"*Mr. Hatch:* Well—

"*The Court:* Yes, you are bringing her into the case, aren't you, when you try to prove anything she said?

"*Mr. Hatch:* Well, it is—I think it is admissible, your honor, if it is an admission on his part of anything on his part.

"*The Court:* You can ask him if he told her.

"*Mr. Hatch:* That is what I am asking him.

"*The Court:* You want to ask him if she didn't say to him something?

"*Mr. Hatch:* And he made a reply to it.

"*The Court:* Well, you will have to limit it in your question as to whether he said to her something.

"*Mr. Hatch:* All right. Take—

"*Mr. Henigan:* I object to the use of that statement, your honor, by the prosecutor here before the jury, because it is a well known rule she can't testify against him.

"*The Court:* That is true that she can't without his consent. Now, Mr. Hatch, you are getting onto thin ice, I am afraid. You may ask him if he admitted so and so, but if in attempting to contradict him it

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would require a violation of the statute you will not be able to contradict him.

"*Mr. Hatch:* All right.

"*The Court:* You can ask him if he didn't say so and so and to his wife; for that matter, if he said it himself, it don't make any difference to whom he said it.

"*Q.* Now, I want to ask you if you didn't say to your wife on the next day after the 2d of July or within a few days of that time, 'I ain't done nothing, but I saw her lying there and I done that'?

"*A.* No, sir.

"*Q.* And wasn't that referring to an admission you had previously made to her that you had used your finger on her?

"*A.* No, sir."

1. Error is assigned on the action of the prosecuting attorney and the trial court relative thereto. Section 12555, 3 Comp. Laws 1915, so far as material to the question here presented, reads as follows:

"A husband shall not be examined as a witness for or against his wife without her consent; nor a wife for or against her husband without his consent," except in certain specified cases, "nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage." * * *

In *Sweikhart* v. *Hanrahan*, 184 Mich. 201, Mr. Justice OSTRANDER said:

"The statute evidences a rule of public policy; the privilege being the privilege of the spouse making the communication, the lips of both being sealed, unless both, otherwise, personally consent."

The exclusion of such communications when made in confidence between persons occupying the intimate relation of husband and wife is predicated on the necessity of fostering such relation and the greater injury likely to result from permitting their disclosure than the benefit to be gained thereby. Confidence and secrecy are presumed to have been intended in such

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marital communications and the statute absolutely prohibits their divulgence by either of the parties as witnesses "without the consent of both."

The course pursued by the prosecuting attorney to which objection was made brought clearly before the jury the fact that defendant's wife had made a statement in writing to him, in which she had said that defendant made the admissions which he as a witness denied. Counsel could not and did not seek to call the wife as a witness. In this indirect way he placed before the jury the fact, unsworn to, that such damaging admissions had been made by the defendant to her. That prejudice resulted therefrom cannot be doubted. There was little to corroborate the testimony of the little girl except the fact that her hymen was found to have been ruptured. The physicians who examined her differed as to whether the rupture was recent. The verdict as rendered indicates that the jury were unable to find that there was such penetration as would constitute rape. For the error thus committed, the verdict must be set aside and a new trial granted.

2. Counsel strenuously insists that "there is no testimony in the case arising to the dignity of evidence to sustain the verdict." Blanche testified that she was awakened in the night and found her father beside her; that her bloomers were slipped down near her knees; that she got up and went to her mother's bed and told her about it,—

"I told her I thought my father did something to me, and she told me she thought I was dreaming. * * * I don't know whether he did or not do something with his private parts to my private parts. That is what I thought, I don't know. * * * There was something done to my private parts, but I can't tell by what it was done. * * * I felt something come out of me, and I jumped up."

She further testified that she told her mother more about it the next morning; that there was something

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in her private parts that night but she could not say what it was.

The defendant testified:

"I got up about 2 or 3 o'clock in the morning to get a drink of water. In going back, I fell over the corner of this davenport. I laid there for a minute, it hurt me so, that is, I laid on the davenport, and it scared this little girl, and she got up and went in her mother's room."

This testimony clearly presented an issue of fact for the jury.

3. Several witnesses testified that defendant had a good reputation in the community in which he lived. His counsel preferred a request in relation thereto, based on our holdings in *People* v. *Garbutt*, 17 Mich. 9, 26 (97 Am. Dec. 162), and *People* v. *Parker*, 166 Mich. 587, 591. In view of what was said in the recent case of *People* v. *Best*, 218 Mich. 141, it is unnecessary to discuss this assignment. The modification of the request by the court simply made it more applicable to the testimony in the case and the claims of the defendant. We have considered the other errors assigned, but deem them without merit.

4. In view of a new trial of this case and the probability that the prosecuting attorney may again seek to cross-examine defendant as to communications made by him to his wife, we feel impelled to consider and determine whether this may be properly done. The statute, already quoted (§ 12555), provides in express terms:

"Nor shall either, during the marriage or afterwards, without the consent of both, be examined as to any communication made by one to the other during the marriage."

Its purpose, as well expressed by Mr. Justice OSTRANDER, has been stated. It absolutely prohibits the examination of either husband or wife as to such

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communications *"without the consent of both."* It is well settled in this State that when a defendant in a criminal case becomes a witness in his own behalf he may be cross-examined in the same manner as any other witness in the case. *People* v. *Sutherland,* 104 Mich. 468. At first blush, it might seem, as it did to the trial court, that under such rule defendant might be asked as to admissions made by him to his wife just the same as though the claimed admissions were made to another person. But cross-examination is restricted as to other witnesses when the answers would reveal confidential communications, the divulgence of which is prohibited by statute. A doctor may not disclose any information acquired in his professional character, revealed by the patient to enable him to prescribe or do any act as a surgeon (3 Comp. Laws 1915, § 12550). Certain witnesses may not testify as to matters equally within the knowledge of deceased persons (§ 12553). No minister of the gospel or priest is permitted to disclose any confession made to him professionally (§ 12549). Nor under the rules of evidence may an attorney testify as to confidential communications made to him by his client except when made for an unlawful purpose. *Alderman* v. *People,* 4 Mich. 414 (69 Am. Dec. 321); *Hamilton* v. *People,* 29 Mich. 173; *Passmore* v. *Passmore's Estate,* 50 Mich. 626 (45 Am. Rep. 62); *People* v. *Van Alstine,* 57 Mich. 69.

There is no question but that the wife of defendant could not be asked to disclose such communications. May he on cross-examination be required to do so? The statute says that neither the husband nor wife shall be examined as to them *without the consent of both.* As the wife is not a competent witness, and not a party, her consent cannot be secured. Aside from this, however, we do not think that defendant could be interrogated as to statements made by him to his wife where her lips as to them are sealed by

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the statute. The effect of permitting such a course to be pursued cannot but be apparent to any person familiar with the trials of criminal cases. Propounding the question, even if answered in the negative, cannot but leave an impression on the minds of at least some of the jury that the wife, if permitted, would testify that the statement was made to her. The statute prohibits such disclosures on the part of the wife and in our opinion must be held to equally prohibit questioning the husband concerning them.

Much has been said and written on the subject of such privileged communications, but we find little directly bearing on the question here presented.

In *Murphy* v. *Commonwealth*, 23 Grat. (Va.) 960, the third paragraph of the syllabus reads:

"On a trial for an assault with intent to kill, the witness upon whom the assault was alleged to have been made, was asked if he did not tell his wife that the prisoner acted only in his own defence. The answer to the question may tend to criminate himself, and the testimony is inadmissible. 2d. It required him to state a communication supposed to have been made by him to his wife; which, if made, was a confidential communication, and which he was not bound to disclose."

In *Cornell* v. *Vanartsdalen*, 4 Pa. St. 364, 374, it is said:

"The rule is the same, in its spirit and extent, as that which excludes confidential communications made by a client to his attorney."

Mr. Greenleaf, in his work on Evidence (Vol. 1, 16th Ed.), § 333*e*, says that the principle on which the disclosure of such communications is prohibited—

"rests on a public policy similar to that which protects confidential communications between attorney and client, * * * the thought being that the full activity and benefit of the relation cannot be attained unless the persons in it have full security in advance that their confidences cannot be disclosed."

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The rule as to attorney and client seems well established. A client cannot be interrogated as to matters concerning which the attorney is prohibited from testifying. On this the text-book writers seem agreed.

"The privilege being for the protection of the client in his subjective freedom of consultation (*ante*, §§ 2291, 2321), it would plainly be defeated if the disclosure of the confidences, though not compellable from the attorney, was still obtainable from the *client*. Accordingly, under the modern theory, it has never been doubted that the client's own testimony is equally privileged." 4 Wigmore on Evidence, § 2324.

"The privilege is that of the client and it follows that where an attorney cannot, because of his professional employment, disclose a communication made to him by his client, the latter cannot be compelled to testify in regard thereto. Therefore, a statute, forbidding disclosure of such communications by an attorney, will not be construed as permitting of compulsory testimony from the client in regard to communication of this character. Otherwise the statute would be practically inoperative." 5 Chamberlayne, The Modern Law of Evidence, § 3679.

"The client does not waive this privilege merely by calling the attorney as a witness, unless he also examines him in chief to the matter privileged; nor by taking the stand himself on his own behalf. The privilege is that of the client, being intended to promote freedom of consultation for those needing legal advice; hence, the client is equally protected from disclosing the communication; and the attorney's willingness to disclose is immaterial." 1 Greenleaf on Evidence (16th Ed.), § 243.

Such decisions as we have been able to find are in harmony with the rule as stated.

In *Birmingham Railway & Electric Co.* v. *Wildman*, 119 Ala. 547, 551 (24 South. 548), it was said:

"For the purpose of attacking the *bona fides* of plaintiff's claim, and showing that, from motives of self-interest, he had purposely withheld from the de-

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fendant all knowledge of and information concerning the accident, defendant's attorney propounded the following questions to plaintiff on cross-examination: 'Did you ask them (your lawyers) to come and see the railroad company about it?' 'Didn't you tell them (your lawyers) to go and present the matter to the railroad company, and ask them to pay you damages?' 'Did you tell them not to sue at once, but to wait a while?' To each of these questions an objection was sustained. The inquiries were not only immaterial and irrelevant, but they also directly called for a disclosure by a client of confidential communications to his attorney. While a party who offers himself as a witness cannot refuse to answer pertinent questions on the ground that he had communicated to his attorney the matters inquired about, yet he cannot be compelled to state whether or not he had communicated certain facts to his attorney, or given him certain instructions. As stated by Mr. Wharton:

"'It is obvious that the guard against the disclosure of such communications by counsel would be a mockery if the client could be compelled to disclose that as to which counsel's lips are sealed. It would be absurd to protect by solemn sanction professional communications, when the lawyer is examined, and to leave them unprotected at the examination of the client.' 1 Wharton on Evidence, § 583.

"*Montgomery* v. *Pickering*, 116 Mass. 227; *Hemenway* v. *Smith*, 28 Vt. 701; *Bigler* v. *Reyher*, 43 Ind. 112."

In *Hemenway* v. *Smith*, 28 Vt. 701, the syllabus reads:

"A party is not obliged, as a witness, to disclose any consultation he may have had with his counsel in relation to the cause. He is equally protected, with his counsel, from testifying respecting confidential communications between them."

In *State* v. *White*, 19 Kan. 445 (27 Am. Rep. 137), the syllabus reads:

"1. Privileged Communications; Client and Attorney; Privilege of Party, as a Witness. A defendant

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charged with the crime of bigamy, being on the trial and testifying in his own behalf, was required by the court to answer on cross-examination whether he had not been consulted or advised by his counsel in regard to obtaining a copy of a decree of divorce alleged to have been granted prior to the second marriage, against the objection of such defendant that the communications between himself and his attorneys were privileged. *Held,* That the court erred, as the defendant had not referred to any consultation or advice in connection with his attorneys in his direct examination, and that the communications were privileged. Any communication which an attorney is precluded by statute from disclosing, his client cannot be compelled to disclose against his objection of privilege."

The authorities cited in each of the above cases will be found instructive. On principle as well as authority, we feel constrained to hold that a defendant in a criminal case may not be cross-examined as to confidential communications made by him to his wife relative to the charge against him. See *People* v. *Toner,* 217 Mich. 640.

The conviction is set aside and the cause remanded to the circuit court for a new trial.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

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PEOPLE *v.* McINTYRE.

1. INTOXICATING LIQUORS—CRIMINAL LAW—ADMISSIONS.
In a prosecution for violation of the liquor law, where defendant admitted that he sold a quart of whisky, the trial court was justified in instructing the jury that it was their duty to convict him.

2. SAME—INDUCEMENT TO COMMIT CRIME—NATURE OF INDUCEMENT.
The acts of the officers of the law in gaining the confidence of defendant and inducing him to sell them the liquor did not constitute an unlawful inducement, justifying his acquittal, since it is only when the criminality of the act is shown to be absent by the fact of the inducement that such proof justifies acquittal.

Exceptions before judgment from Jackson; Parkinson (James A.), J. Submitted April 14, 1922. (Docket No. 128.) Decided June 5, 1922.

William McIntyre was convicted of violating the liquor law. Affirmed.

John F. Henigan, for appellant.

M. Grove Hatch, Prosecuting Attorney, and *Arthur W. Wiggins,* Assistant Prosecuting Attorney, for the people.

SHARPE, J. The first count in the information filed against defendant charged him with unlawfully selling one quart of whisky to William L. Waltman at the township of Grass Lake in the county of Jackson on June 24, 1921. Two other counts were added, but withdrawn, and need not be considered. He seeks review of his conviction on exceptions before sentence.

From the testimony it appears that certain officers,

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having suspicion that defendant was violating the prohibition law, went to the summer hotel conducted by him on Mack Island and registered as guests. Mr. Bresler was a Federal agent. Waltman was connected with the food and drug department of the State. They were accompanied by relatives of Waltman. They had provided themselves with several small bottles of whisky. They sought to gain defendant's confidence by drinking in his presence and in the presence of a man in his employ. One of them intentionally dropped a small bottle from his pocket on the floor of the porch of the hotel on which they were sitting. The second day they were there Bresler testified he asked defendant for liquor and defendant expressed a willingness to sell him a quart for $17. Bresler asked defendant to bring it to his room, to which he and Waltman then went. Defendant soon after appeared with a bottle of old American whisky. He was handed a $20 bill, went out and soon after returned with the change.

The defendant was called as a witness in his own behalf. In his testimony, as set forth in narrative form, appears the following:

"Bresler says to McIntyre 'Any chance of getting any liquor around here?' McIntyre kind of hesitated, but thought they were pretty good fellows and said 'Well, I have got two or three bottles of pretty good stuff. I am not crazy about disposing of it, but if you want to pay the price for it I will let you have one of the bottles.' Bresler asked him what the price would be and he said $17, and Bresler says 'All right, go and get it.' McIntyre had two or three bottles in his room and he went upstairs and got one of them which was old American whisky; that he brought it down in a newspaper and took it into the room where Bresler and Waltman was; that Waltman was slightly under the influence of liquor, that he swooned over on the bed and fell back asleep like and that Bresler had to kick him on the foot to kind of revive him; and Bresler asked Waltman if he wanted to get in on

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this. He said yes, and Bresler gave McIntyre $20 and McIntyre later gave him back the change. But just before this, McIntyre said to Bresler and Waltman: 'Now, this bottle shows evidence of being tampered with, but it has not been; it hasn't been out of my presence since I have had it some time, but it is probably too hot where I had it in my room. Take a drink of it and see if it is all right. I would not want you to pay for it, if you didn't think it was all right.' That they each had a drink out of this bottle, that is, the two officers did but was feeling kind of good; had two or three drinks before that, referring to the drinks out of other bottles before, so he took a drink out of the bottle just to please them. McIntyre was asked why he furnished Bresler this quart of liquor and his answer was 'I presume it was the way they used me; they had plenty of liquor and gave me all I wanted of it, and I was feeling pretty good.' He said he did not have the liquor there for sale; that he told them so at the time and that was the reason he put the price on it of $17, that is, that he did not care to let it go; that they told him they would have to leave, would have to break up there if they did not get some more liquor. * * * He admitted that he knew the price of whisky and that he was not so drunk but what he knew that and that he knew enough to make the change of the money and that he was sane and conscious and knew it was a violation of the law, except he says he did not know it in fact right then, just what he was doing. * * * McIntyre swore that he supposed he was violating the law when he sold the whisky to Bresler and Waltman and knew that it wasn't right, but he didn't know in fact right then just what he was doing, that they found some whisky in his hotel afterwards."

In view of this admission on the part of the defendant, the trial court was fully justified in instructing the jury that it was their duty to convict him. They retired and promptly did so.

Defendant's counsel urges that the testimony of the people's witnesses should have been "stricken from the case for the reason that officers have no right to decoy

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with people or connive with people for the violation of the law." He calls attention to the decisions of this court in *Saunders* v. *People*, 38 Mich. 218; *People* v. *McCord*, 76 Mich. 200, and *People* v. *Pinkerton*, 79 Mich. 110. In those cases the court in no uncertain terms characterized the acts of officers in conniving with or persuading people to commit crimes and then prosecuting them therefor. The record in this case presents no such facts. It is true that the officers sought to gain the confidence of the defendant and to satisfy him that it would be all right to sell them the whisky, but their acts did not constitute an unlawful inducement. The rule is well stated in *People* v. *Liphardt*, 105 Mich. 80, 83:

"We know of no case that holds that one who has committed a criminal act should be acquitted because induced to do so by another. It is merely when the criminality of the act is shown to be absent by the fact of the inducement that such proof justifies acquittal."

See, also, *People* v. *Everts*, 112 Mich. 194, and cases cited; *People* v. *Lalonde*, 171 Mich. 286.

The exceptions are overruled. The trial court may proceed to judgment on the verdict.

FELLOWS, C. J., and MCDONALD, BIRD, MOORE, and STEERE, JJ., concurred.

WIEST and CLARK, JJ., concurred in the result.

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PEOPLE *v.* SCHIDDEL.

1. INTOXICATING LIQUORS—CRIMINAL LAW—ADMISSIONS—EVIDENCE—SUFFICIENCY.

   In a prosecution for violation of the liquor law, where defendant admitted the sale of two pints of whisky as charged, but claimed as a defense that he did it for the purpose of securing evidence against the person from whom he procured it, although he admitted that the persons to whom he sold it had no knowledge of such intent, the trial court properly instructed the jury that if they believed the testimony of the witnesses to whom the sale was made, and that the admissions of defendant were true, it was their duty to convict.

2. SAME—TRIAL—INSTRUCTION—GOOD FAITH—INTENT.

   Defendant was not entitled to an instruction that if the admitted sale was made in good faith for the purpose of detecting and exposing another as a violator of the law, defendant should be acquitted, since intent is not an element of the offense.

3. SAME—SPECIAL QUESTIONS INAPPLICABLE IN CRIMINAL CASE.

   Since the statute (3 Comp. Laws 1915, § 12611) providing for the submission of special questions to the jury has application only in the trial of civil cases, the trial court was in error in submitting to the jury the special question as to whether defendant, in making the admitted sale, acted in good faith for the purpose of detecting and exposing a violator of the law.

Exceptions before judgment from Jackson; Parkinson (James A.), J. Submitted May 4, 1922. (Docket No. 141.) Decided June 5, 1922.

Henry Schiddel was convicted of violating the liquor law. Affirmed.

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James J. Noon and *John F. Henigan,* for appellant.

M. Grove Hatch, Prosecuting Attorney, and *Arthur W. Wiggins,* Assistant Prosecuting Attorney, for the people.

SHARPE, J. The defendant was convicted of selling two pints of whisky to Claire Stoddard and George Snedicor at the city of Jackson on March 15, 1921, and seeks review thereof on exceptions before sentence.

Stoddard and Snedicor were officers charged with the enforcement of the prohibition law. They registered at defendant's hotel. Snedicor, who was somewhat well known, assumed the name of Davis. Defendant, at Snedicor's request, brought two pint bottles of whisky to a room in the hotel in which both Stoddard and Snedicor were, for which they paid him $10. Defendant was a witness in his own behalf. On direct-examination he testified that Snedicor asked him, "Can you get me any liquor?" and he said "No. There was a man sitting there on the outside, his name is Jack Wilson, and he jumped up and said he could get him a quart for $10." That later—

"Mr. Snedicor came in, and he went to Mr. Stoddard's room; this Jack Wilson was hanging around and I was stalling him along, and I asked him where he got his liquor from. I asked Jack Wilson. I took him to 105 room and talked with him there; I asked him where he got his liquor from and he said he got it from Detroit, and I asked him how he got it in and he said, 'Why, they send it here in a near-beer barrel.' I said, 'In a near-beer barrel?' He said, 'Yes,' and then he said to me, 'What are you trying to do, you trying to hang me or something?' and I said, 'No, I am not.' So I took the liquor, the two pints of liquor and took it into Mr. Stoddard's room and handed them to Mr. Stoddard and took the $10 and gave it to Mr. Wilson. Wilson was standing on the outside of the door when I gave him the money."

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He further testified that he made the sale for the purpose of getting evidence against Wilson and pursuant to an arrangement he had made with Van Loomis, an inspector of the State food and drug department. On cross-examination he admitted that he did not inform either Stoddard or Snedicor that he got the liquor from Wilson.

Defendant's counsel insisted on their right to go to the jury on the question of his "good faith or lack of it" in making the sale. The court instructed the jury that if they believed the testimony of Stoddard and Snedicor and that the admissions of the defendant were true, it was their duty to convict defendant. The jury retired and soon returned with a verdict of guilty. As a result of the discussion with defendant's counsel on the question of good faith, the trial court prepared the following question:

"In making the admitted sale to Stoddard and Snedicor, was Schiddel acting in good faith for the purpose of detecting and exposing one Jack Wilson as a violator of the prohibition law?"

and instructed the foreman to poll the jury on the question, and if they convicted the defendant, advise the court of the jurors' answers thereto. This was done, the foreman at the time of announcing the verdict saying that "two answer 'Yes,' and ten answer 'No.'" Defendant's counsel, while submitting no authorities, argue strenuously that the jury should have been instructed that if the sale was made by defendant for the purpose indicated in the special question they should acquit the defendant.

There would be merit in defendant's claim if based on an arrangement claimed to have been made with Stoddard and Snedicor, or either of them. He admits that so far as they were concerned he sold them two pint bottles of whisky for which they paid him $10 and that they had no knowledge as to where or

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of whom he procured it. This was a clear violation of the law on his part. He admits that he could have procured the evidence against Wilson quite as effectively without the delivery of the liquor. The statute absolutely prohibits the sale. The intent with which it was made, while it may affect the sentence imposed, is not involved as an element of the crime. An interesting discussion of the question presented will be found in *People* v. *Roby*, 52 Mich. 577 (50 Am. Rep. 270). The court should not have submitted the special question to the jury. The statute providing therefor (3 Comp. Laws 1915, § 12611) has application only in the trial of civil cases.

The other assignments, while not discussed, have had consideration. We find no reversible error in the record. The court may proceed to sentence.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

COLLARD v. RONIS.

1. NEGLIGENCE—PERSONAL INJURIES—EVIDENCE—BURDEN OF PROOF. In an action against R. and B., as individuals and as doing business as a company, for personal injuries caused by an automobile driven by R., but alleged to be owned by defendants and operated in their business, the burden of proof is upon plaintiff to show the liability of B.

2. SAME—NEW TRIAL—EVIDENCE—GREAT WEIGHT OF EVIDENCE. Where the only testimony connecting B. with the owner-

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ship or operation of the car was the testimony of plaintiff's brother that B. said R. was working for him, which statement B. denied, and both B. and R. testified that R. was not in B.'s employ, and R. further testified that he was the owner of the car and the license was in his name, a verdict against B. is *held*, to be against the great weight of the evidence.

Error to Wayne; Davis (Frank D. M.), J., presiding. Submitted April 25, 1922. (Docket No. 135.) Decided June 5, 1922.

Case by Margaret Collard against Max Ronis and Jacob Bomze for personal injuries. Judgment for plaintiff. Defendant Bomze brings error. Reversed.

McIntyre & Robinson, for appellant.

Clarence P. Milligan, for appellee.

SHARPE, J. The plaintiff was injured by a Ford touring car, driven by the defendant Ronis, on Jefferson avenue in the city of Detroit on April 3, 1920. The declaration complained of the defendants as individuals and as "doing business as Michigan Window Cleaning Company." The negligence complained of was the operation of the automobile in a reckless and negligent manner and the running of it inside the limits of a "safety zone" in which plaintiff was standing. The plea was the general issue. Plaintiff testified that both defendants were in the car at the time it struck her. She was carried into a nearby drug store and afterwards removed to a hospital, the defendant Bomze driving the car during such removal and the defendant Ronis sitting in the back seat and affording her support. Dr. Seibert, who attended her at the hospital, and her husband, Edgar Charles Collard, testified as to her injuries. The city clerk produced the ordinance of the city providing for the establishing of safety zones, etc. The plaintiff then rested.

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Defendants' counsel thereupon moved for a directed verdict for both defendants on the ground that no actionable negligence was proven, and also on behalf of the defendant Bomze for the reason that there was no evidence connecting him with the ownership or the operation of the car. The court intimated that as to Bomze the motion seemed to be well founded, whereupon plaintiff's counsel asked and was granted leave to submit further proof. Both defendants were then called as adverse witnesses and examined at length. Ronis admitted that he owned the car. He denied that he was working for Bomze or that they were in any way engaged in business together. He testified that Bomze, who was an unmarried man, was rooming at his home and was riding with him to his (Bomze's) office, near where the accident happened; that when stopped by the traffic on Jefferson avenue Bomze alighted and was not in the car at the time plaintiff was injured. Bomze's testimony was to the same effect. He explained his presence in the drug store by saying that when near the stairway leading to his office he stopped and soon after saw plaintiff being carried into the drug store; that he afterwards drove the car to the hospital as an accommodation and to assist Ronis in caring for plaintiff.

It was apparent that no proof had yet been offered to charge Bomze with liability. Plaintiff's brother, Roy A. Foster, was then called. He testified that he had not been in court on the preceding day when the motion to direct was made, though he had met plaintiff's counsel before that time in his office. He further testified that at his sister's request he "made some investigation of this case. I first saw Mr. Bomze * * * at his office on Bates street, and had a talk with him." That he saw a Ford touring car in front of the office with ladders on it; that Bomze said Ronis "was only working for him." That

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he had been to police headquarters, where he was informed of the license number of the car but made no effort to ascertain the name of the owner, though he knew where he could do so. He did not examine the number on the car standing in front of Bomze's office.

Bomze, being recalled, denied the conversation with Foster. He testified that after the accident he bought a Ford car for his own use and the license was in the name of the Michigan Window Cleaning Company, a copartnership, composed of himself and William C. Roesler.

The motion to direct a verdict as to defendant Bomze was then renewed and denied. The case was submitted to the jury under instructions that to find against Bomze the proofs must satisfy them either that Ronis was in the employ of Bomze or was operating the car under his instructions. The jury rendered a verdict for plaintiff against both defendants for $800. Defendant Bomze's motion for a new trial, on the ground that the verdict was against the great weight of the evidence, was denied. The judgment is here reviewed by him by writ of error. The assignment discussed is the refusal to grant a new trial for the reason stated.

The duty imposed on this court under the statute (3 Comp. Laws 1915, § 12635) to review the action of the trial court in refusing to grant a new trial has been pointed out in so many cases that we content ourselves with calling attention to a few of them. *Hintz* v. *Railroad Co.*, 132 Mich. 305; *In re McIntyre's Estate*, 160 Mich. 117; *Krouse* v. *Railway*, 166 Mich. 147.

The only testimony tending in any way to connect the defendant Bomze with the injury sustained by plaintiff is her statement that he was riding in the car with Ronis, and that of Foster, her brother, that

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Bomze said Ronis was working for him. The statement of the plaintiff was not sufficient on which to predicate liability. It must rest on the testimony of Foster. The fact that he was not called until plaintiff's counsel had endeavored in every other way to make such proof is significant. As against his testimony, we have the denial of Bomze that such statement was made by him and the positive testimony of both Bomze and Ronis that the latter was not in the employ of the former at that time.

It is but fair to require plaintiff to submit such proof as is available to sustain the burden cast upon her by the law. There may be cases where the right of a plaintiff to recover is dependent upon the testimony of a single witness and unless there be something in the record to discredit such testimony we should hesitate in setting aside a verdict based on it, though contradicted by interested witnesses for the defense. The plaintiff might easily have ascertained in whose name the license for the car which injured her was taken out. Ronis testified he was the owner of the car and the license was in his name. If this be true, and we must so assume, it tends to negative the claim that he was in the employ of Bomze, as an employee does not usually furnish a car for the use of his employer.

While reluctant to interfere with the discretion exercised by the trial court in denying defendant Bomze's motion, after a careful reading of the entire record we are of the opinion that the verdict is so against the great weight of the evidence as to necessitate the reversal of the judgment and the granting of a new trial. It is so ordered. Defendant Bomze will recover his costs in this court.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

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BAAS *v.* ZINKE.

1. COMPROMISE AND SETTLEMENT—SETTLEMENTS FAVORED AT LAW AND IN EQUITY.

   Settlement of family difficulties or controversies arising out of the distribution of estates is favored both at law and in equity, if at all reasonable and entered into understandingly.

2. SAME—TERMINATION OF A WILL CONTEST SUFFICIENT CONSIDERATION.

   The termination of the controversy or a promise to forbear the contest of a will is a valid and sufficient consideration for such an agreement.

3. SAME—MAY BE SET ASIDE FOR FRAUD.

   Such a settlement will, however, be set aside where there is affirmative proof that it was procured by fraud.

4. FRAUD—NOT PRESUMED—BURDEN OF PROOF.

   Fraud is not lightly to be presumed, and the burden is on those alleging it to prove it.

5. MISTAKE—CONTRACTS—REFORMATION OF INSTRUMENTS—MUTUAL MISTAKE.

   Ordinarily, in order to entitle a party to relief by way of reformation of a contract on the ground of mistake, it must appear to have been mutual.

6. SAME—FAILURE OF MEETING OF MINDS DUE TO MISTAKE GROUND FOR RESCISSION.

   A mistake of one party of such a character that the minds of the parties cannot be said to have met, if clearly established, is ground for rescission, in equity.

7. FRAUD—CONTRACTS—EVIDENCE—SUFFICIENCY.

   In a suit to set aside an agreement regarding the probate of a will and certain conveyances executed pursuant thereto, the charge of fraud therein, *held*, not sustained by the proofs.

8. MISTAKE—CONTRACTS—EVIDENCE—SUFFICIENCY.

   Where plaintiff's claim that he signed said agreement

On relief from mistake of law as to effect of instrument, see note in 28 L. R. A. (N. S.) 785.

On effect of mistake as to legal rights, as affecting compromise and settlement, see note in 28 L. R. A. (N. S.) 841.

On compromise and settlement of controversy over will as changing nature of interest or estate under will, see note in 5 A. L. R. 1384.

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under a mistake is largely based upon the allegation that it was not read over to or understood by him, but the record is very convincing that said agreement and conveyances were all read over and carefully explained to him by the attorney who drew them, and it is not apparent from the proofs that any advantage was taken of him, the decree dismissing the bill will be affirmed.

Appeal from Ottawa; Cross (Orien S.), J. Submitted April 11, 1922. (Docket No. 48.) Decided June 5, 1922.

Bill by Nick Baas and others against Kate Zinke and others to set aside an agreement regarding the probate of a will, and certain conveyances made pursuant to such agreement. From a decree dismissing the bill, plaintiffs appeal. Affirmed.

Charles E. Misner, for plaintiffs.

Diekema, Kollen & Ten Cate, for defendants.

SHARPE, J. The parties are the heirs at law of Johanna Baas, who died at the city of Holland in Ottawa county on January 29, 1917, leaving a last will and testament. Objections to the probate of the will were filed by the defendants. Pending the hearing, a conference of all the parties was arranged for by the plaintiff Nick Baas. It was held on March 31, 1917, in the office of Diekema, Kollen & Ten Cate, the attorneys who had filed the objections on behalf of the defendants. Derk J. Te Roller, who had drawn the will and was named as executor therein, was present at Nick's request. The conference lasted several hours. Mr. Kollen (since deceased) and Mr. Ten Cate took part in the discussion. An agreement was finally reached, reduced to writing by Mr. Kollen, and the several conveyances necessary to give it effect prepared by him, and all were executed and delivered in conformity therewith. The objections to the will were then withdrawn and it was admitted to probate.

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On March 16, 1920, nearly three years later, this bill of complaint was filed to set aside this agreement and these conveyances. It is alleged that their execution by Nick Baas was procured—

"through fraud, deceit and misrepresentation and mistake, practiced upon him by the defendants; that he is uneducated and unable to read, write or understand the English language to a very great extent; that he entered into said contract on the understanding and agreement by said defendants that he would receive a deed from them of their interest"—

in certain property owned by the testatrix at the time of her death.

The trial court found that:

"These instruments were all read over and explained to the several parties and were fully understood by them at the time the same were executed,"

and dismissed the bill of complaint. The plaintiffs appeal. It is their claim that the settlement gave the defendants "an inequitable or unconscionable advantage over the plaintiffs," that it was made under a "mutual mistake of fact," and "does not represent the true intent of the parties."

Settlement of family difficulties or controversies arising out of the distribution of estates are favored, both at law and in equity, if at all reasonable and entered into understandingly. The termination of the controversy or a promise to forbear the contest of a will is a valid and sufficient consideration for such an agreement. *Conklin* v. *Conklin,* 165 Mich. 571, 580; *Layer* v. *Layer,* 184 Mich. 663, 671. Such a settlement will, however, be set aside where there is affirmative proof that it was procured by fraud. But fraud is not lightly to be presumed, and the burden is on those alleging it to prove it. *Donnelly* v. *Lyons,* 173 Mich. 515; *A. E. Wood & Co.* v. *Standard Drug Store,* 192 Mich. 453; *Torrent* v. *Torrent, ante,* 381. Ordinarily, in order to entitle a party to relief by way of

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reformation of a contract on the ground of mistake, it must appear to have been mutual. *Schlossman* v. *Rouse,* 197 Mich. 399. But a mistake of one party of such a character that the minds of the parties cannot be said to have met, if clearly established, is ground for rescission in equity. *McGraw* v. *Muma,* 164 Mich. 117; *Sutherland* v. *Sutherland,* 69 Ill. 481; *Dulany* v. *Rogers,* 50 Md. 524; *Douglas* v. *Grant,* 12 Ill. App. 273; *Bancharel* v. *Patterson,* 64 Minn. 454 (67 N. W. 356). See, also, note to *Dolvin* v. *American Harrow Co.,* 28 L. R. A. (N. S.) 785 (125 Ga. 699, 54 S. E. 706), and 12 C. J. p. 350 *et seq.*

There is no proof sustaining the charge of fraud. The claim of mistake is based on the allegation that the settlement agreement was not read over to or understood by the plaintiffs and is said to be supported by the fact that under it Nick Baas would not receive a fair share of the estate, though he was the principal beneficiary under the will. The record is very convincing that the written instruments were all read over and carefully explained by Mr. Kollen, both in English and in Dutch, before their execution. It is not apparent from the proofs that any advantage was taken of the plaintiffs. There is no evidence of the values of the respective properties and no comparison of the rights conveyed or surrendered can be fairly made. The delay of the plaintiffs in seeking relief is not satisfactorily explained. In the meantime, the defendants withdrew their objections to the probate of the will and some of them made substantial improvements in reliance on the conveyances. We feel constrained to agree with the conclusion reached by the trial court.

The decree dismissing the bill is affirmed, with costs to defendants.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

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MEADE *v.* BROWN.

1. MISTAKE—MUTUAL MISTAKE—CONTRACTS—RESCISSION — REFORMATION OF INSTRUMENTS.

   A mistake, although not mutual, may, if clearly established, be ground for rescission, though not for reformation, of the agreement.

2. SAME—SPECIFIC PERFORMANCE—LEASE—OPTION TO PURCHASE—PRESUMPTION—BURDEN OF PROOF.

   In a suit for the specific performance of an option to purchase contained in a lease of the premises given to plaintiff, where the defense is that such provision was inserted by mistake on the part of the scrivener, the burden of proof is on the defendants to overcome the presumption that when they signed the writing they understood its contents.

3. SAME—EVIDENCE—SUFFICIENCY—BURDEN OF PROOF.

   Evidence on the part of defendants *held*, insufficient to meet the burden of proof.

4. WITNESSES—CREDIBILITY—CONTRADICTORY SWORN STATEMENTS TO BE CONSIDERED.

   Where defendant's sworn testimony as a witness was contradictory to his answer, verified by him under oath, the court cannot but give consideration to such contradictory statements made under oath when weighing his testimony.

5. DAMAGES—EXCESSIVE AWARD—MODIFICATION.

   Where the decree in favor of plaintiff erroneously permitted him to retain from the purchase price interest not yet due, the same will be modified and affirmed.

Appeal from Gogebic; Driscoll (George O.), J. Submitted April 27, 1922. (Docket No. 15.) Decided June 5, 1922.

Bill by William G. Meade against Joseph R. Brown and another for the specific performance of an optional

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land contract. From a decree for plaintiff, defendants appeal. Modified and affirmed.

Herb. M. Norris, for plaintiff.

Solomon W. Patek (*Allan R. Black,* of counsel), for defendants.

SHARPE, J. On August 17, 1912, the parties entered into a written agreement by which defendants leased to plaintiff certain premises in the city of Ironwood used for a livery stable for a term of 10 years at an agreed upon monthly rental. Under its terms plaintiff had the option to extend the lease for an additional 10-year period. This writing also contained the following language in a paragraph separate and distinct from that which preceded or followed it:

"And it is further understood and agreed, that, in consideration of the rental paid as herein specified, the said parties of the first part shall and will sell unto the said party of the second part the lands and premises hereinbefore described upon the payment by said party of the second part to the said parties of the first part of the sum of five thousand dollars in addition to the rentals due and accrued to the time of such sale, this option of said party of the second part to purchase said property shall extend during the term of this lease or any extension thereof."

The plaintiff entered into possession and occupied the premises, paying the rental as provided. On October 5, 1920, he notified defendants in writing of his desire to exercise the option to purchase. The defendants refused to convey, and plaintiff here seeks to compel specific performance. From a decree in his favor the defendants appeal.

The defense is based on the claim that at the time the lease was prepared and executed there had been no agreement between the parties giving plaintiff the option to purchase; that this provision was inserted

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without the knowledge of the defendants; that they did not read the lease nor was it read to them; that its insertion was due to a mistake on the part of the scrivener who drew the lease, and that it would be inequitable to enforce it.

The plaintiff, while residing in Ironwood, was in the employ of the Oliver Mining Company at Duluth, Minnesota. The deal for the lease and the purchase of the livery business was negotiated with defendant by Henry Meade, plaintiff's brother. After an agreement had been reached, the plaintiff and his brother and defendant Joseph R. Brown went to the office of James A. Sullivan on August 17th to have the writings prepared. Mr. Sullivan testified that they discussed the terms and conditions of the agreement as reached by them and he made notes thereof; that from these notes he prepared a bill of sale of the contents of the livery stable from defendant to plaintiff, two notes given by plaintiff to defendant as part consideration of such sale, and the lease in question. On August 19th, Brown called at Sullivan's office. The papers were ready for execution. Sullivan testified that the lease was drawn in accordance with the instructions he had received and evidenced the agreement of the parties as stated to him on the 17th; that he had typewritten it himself; that he handed the lease to Brown to read. Meade was not then present. Both defendants testified that they signed it without reading.

We have here a written contract, signed by both defendants in August, 1912. A duplicate has been in possession of the defendant Joseph R. Brown since that date. They now ask that a provision in it giving the plaintiff an option to purchase the property be not enforced for the reason that such provision was inserted by mistake on the part of Mr. Sullivan, who prepared it, and say that they did not know it was so

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inserted until more than eight years later, when plaintiff sought to enforce it.

A mistake, although not mutual, may, if clearly established, be ground for rescission, though not for reformation, of the agreement. See *Baas* v. *Zinke, ante,* 552, and cases cited. That the agreement reached by the parties, and of which the contract is the written evidence, included the option on the part of the plaintiff to purchase is testified to by plaintiff and his brother Henry. Mr. Sullivan as a witness was asked:

"Was there anything put into that written lease except such things as were agreed upon in your office and written down by you?"

and answered, "No, sir." Frank Miley, a witness for plaintiff, testified that defendant Joseph R. Brown about the first of September, 1920, said to him:

"He said that the option wouldn't stand, for the simple reason that there wasn't any money paid down on the option."

A copy of the lease as executed was attached to the bill of complaint. In the joint and several answer of the defendants, verified by them under oath on the 25th day of January, 1921, they "deny that the same is a copy of the lease executed between the parties." When examined as a witness, the defendant Joseph R. Brown admitted that he read his copy of the lease containing the option agreement soon after October 5, 1920. The verification of pleadings is not an idle ceremony, and we cannot but give consideration to these contradictory statements made under oath when weighing the testimony of this defendant. The burden of proof is on defendants to overcome the presumption that when they signed the writing they understood its contents. This they have failed to meet.

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On June 22, 1920, the defendants executed a mortgage on the premises in question to Andrew Olson and Frida Olson, of Hurley, Wisconsin, in the sum of $2,000, bearing interest at seven per cent. per annum and payable one year after date. Pending the hearing in the circuit court, the Olsons filed a petition for leave to intervene and an order was made permitting them to do so. It does not appear that an answer was filed by them, nor was either of them sworn as a witness. The decree was made before the mortgage became due. It permitted the plaintiff to retain from the purchase price the sum of $2,140, the amount of the principal and one year's interest on the mortgage, and to pay the same to the Olsons on receiving a discharge of the mortgage. The year's interest was not then due, and in this respect the decree was not justified.

The mortgage is now past due and a decree may be prepared and here signed, affirming that made in the court below, but providing for the payment by plaintiff to the Olsons of the amount now due on the mortgage. On the surrender of this mortgage and the note secured thereby to defendants and tender of the balance of the purchase price, with interest at five per cent. from October 5, 1920, the defendants shall execute a warranty deed to plaintiff. In default thereof, the decree may be recorded as evidence of such transfer. No costs of the appeal will be allowed.

FELLOWS, C. J., and WIEST, MCDONALD, BIRD, MOORE, and STEERE, JJ., concurred. CLARK, J., did not sit.

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RUCKLICH v. AMERICAN CAR & FOUNDRY CO.

1. NEGLIGENCE—NEW TRIAL—EVIDENCE—GREAT WEIGHT OF EVIDENCE.

   In an action for damages to plaintiff's brick building, alleged to have been caused by a 6,000-pound hammer in defendant's factory across the street jarring the ground and causing a vibration resulting in the damage alleged, a verdict for plaintiff, *held*, not against the great weight of the evidence.

2. SAME—DAMAGES—EXCESSIVE VERDICT.

   A verdict for $2,500 cannot be said to be excessive, in view of the testimony of the architect of the building that he had examined it, and his estimate of the cost of repairing it exceeded $3,000.

3. TRIAL—VIEW OF PREMISES WITHIN DISCRETION OF COURT.

   The granting or refusing of a request for the jury to view the premises is a matter within the discretion of the court.

4. SAME—CONDUCT OF COUNSEL—PREJUDICE—VIEW OF PREMISES.

   Where plaintiff's counsel, in the absence of the jury, requested the court to permit the jury to view the premises, to which request defendant's counsel objected, and later plaintiff's counsel called the court's attention to this request in the presence of the jury, and the court stated that he had "quite a well-settled rule" not to send a jury to view the premises unless by consent of counsel, and defendant's counsel said he was willing to leave it to the discretion of the court, and the court then denied the request, it cannot be said that the jury understood that defendant's counsel was the one that prevented them from viewing the premises, and defendant was so prejudiced thereby as to require reversal of the case.

5. EVIDENCE—JURORS—IMPEACHING VERDICT.

   Testimony by a juror, in support of a motion for a new trial, that the question of the refusal of the court to allow them to view the premises was discussed in the jury

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room, and that he thought the jury were influenced thereby, *held*, incompetent.

6. TRIAL—INSTRUCTIONS—DAMAGES—EFFECT OF READING NEWSPAPER REPORTS.

In view of the explicit instructions of the court to the jury on the question of damages, it cannot be assumed that their verdict was not founded on the proofs submitted to them because they may have read or heard read a newspaper report which stated that the verdict on a former trial was for $2,800.

7. SAME—CONDUCT OF COUNSEL—PREJUDICE—INTENT.

An offer by plaintiff's counsel to testify to certain statements made by defendant's servant in charge of the hammer, rejected, after colloquy between court and counsel, on objection of defendant's counsel, cannot be said to have prejudiced defendant, in the absence of anything in the record indicating that said offer was made with any intent to do so; the test being as to whether counsel was intentionally seeking to inject into the record facts not competent as proof for the purpose of creating a prejudice in the minds of the jury and whether the jury were probably influenced thereby.

8. SAME—EXCLUSION OF EVIDENCE—CONDUCT OF COUNSEL.

Where plaintiff's offer to show the effect of the jarring caused by defendant's hammer on a house in the neighborhood was withdrawn on objection of defendant's counsel, the latter may not complain because like testimony offered by him after plaintiff had closed his case was rejected on objection of plaintiff's counsel, since counsel may not object to a certain line of testimony, and, after securing its exclusion or withdrawal, produce similar testimony on his client's behalf.

Error to Wayne; Mayne (Frederick W.), J., presiding. Submitted April 19, 1922. (Docket No. 81.) Decided June 5, 1922.

Case by Stephen Rucklich against the American Car & Foundry Company for damage to a building. Judgment for plaintiff. Defendant brings error. Affirmed.

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Angell, Turner & Dyer, for appellant.

Francis H. Warren, for appellee.

SHARPE, J. Plaintiff is the owner of a two-story hotel building erected in 1910, located at the corner of Medbury avenue and Russell street in the city of Detroit. The plant of the defendant is on the opposite or east side of Russell street. It had been established many years prior to the erection of plaintiff's building, and was used in the manufacture of railway cars and other like equipment, necessitating the use of heavy hammers of various weights, which had been installed from time to time, the heaviest weighing 2,500 pounds. In 1916, defendant entered into a contract to manufacture heavy artillery shells for the British government. This necessitated the use of a 6,000-pound hammer, capable of striking a blow of 30,000 foot pounds. This hammer was installed in December, 1916, and actual production by its use began shortly after January 1, 1917. The contract was completed in March, 1917, but the hammer was "used intermittently until shortly after the close of the war in November, 1918." Plaintiff claims "it probably hit a few times hard" during 1919. Plaintiff's building was of brick construction, 30x62 feet. He had it redecorated in 1916. He claims that in November the pounding of the heavy hammer began to affect the walls of his building. On February 12, 1917, he mailed a letter to the defendant, calling attention to the damage being done "by the continued pounding of machinery which is causing considerable cracking of plastering and is fast deteriorating my building." That a few weeks later three men, representing the defendant, came to the building and looked it over, but they said nothing to him and "the pounding didn't stop." That as a result of the vibration caused by the use of this heavy hammer his building was badly injured.

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On December 7, 1917, plaintiff began this suit. His claim for damages to his business was withdrawn and that for injury to the building submitted to the jury, who found a verdict for him in the sum of $2,500. Defendant moved for a new trial for the reasons, among others, that the verdict was excessive and against the weight of the evidence. This motion was denied. The defendant here reviews the judgment entered on the verdict by writ of error.

1. Was the verdict against the great weight of the evidence? In discussing this question, counsel for defendant concede that plaintiff's building was "in a bad state of repair. The rear wall was cracked in one or two places, several cracks had appeared in the bar room floor, and the walls generally needed redecorating." It is their contention that this condition "was due to inherent defects in construction, and that in any event, whatever was the cause, it could not have been the operation of the hammer complained of." It seems also to be conceded that if plaintiff's building was damaged by the use of the 6,000-pound hammer, recovery may be had.

The plans and specifications for plaintiff's building were prepared by Joseph G. Kastler, an architect whose competency is not questioned. He did not superintend its erection, but says he "was called in by Mr. Rucklich once or twice toward the finish. I helped him out in the finish." He examined the building in 1916 or 1917 and again on March 22, 1919. On the latter date he made a report on its condition, which was admitted in evidence without objection. In this report he stated specifically the damaged condition of the walls, outside and inside, and the floors and ceilings of the rooms. The report concluded:

"The jarring caused by pounding will pulverize the mortar between bricks which makes it impossible to bind the brick together by pointing only. The cracks

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in brick work are not in a dangerous condition if there is no more heavy pounding which would cause the building to shake."

He testified:

"A very heavy jarring or vibration of ground would produce the condition I found to exist."

On cross-examination he testified:

"I don't think that the pulverizing of the plaster and mortar was due to any cause other than a jar, because we have cracked walls sometimes and the joint is clean. If there is a continuous vibration, it is pulverized. * * * I could not say that this condition was necessarily due to the operation of a steam hammer. I would expect it but I could not say that; any other heavy jar would cause that; any condition that would jar the building."

He further testified that the jarring of a passing street car "would not crack it that much." The plaintiff testified:

"I think about November some time they started pounding, jarring and shaking the building, and the building tried to crack, cracked walls outside and inside the place. I wrote them a letter to come and see it or stop. I couldn't sleep nights. They didn't pay any attention for a long time."

Several witnesses called by plaintiff testified that while in the hotel they heard the noise of the pounding and noticed the shaking of the building produced thereby. The constant use of the hammer from January to March, 1917, and its occasional use thereafter were admitted by defendant's chief engineer.

Defendant's claim is that the condition of the building was due to improper construction, particularly in the matter of drainage, and that under the proofs the noise and jarring were shown to have occurred at times when the heavy hammer was not being used. There was testimony to support such claim. A question for the jury was thereby presented. We are un-

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able, as was the trial court in denying defendant's motion for a new trial, to say that the verdict was so contrary to the great weight of the evidence as would justify a court in setting it aside for that reason.

2. Was the verdict excessive? Mr. Kastler, the architect, testified that soon after making his report in 1919 he made estimates of the cost of repairing the building and they exceeded the sum of $3,000. Several men engaged in construction and decorative work were examined. While their testimony is in the nature of estimates, we think it furnished sufficient support to justify the verdict of the jury. After reading the entire record, we are not impressed that the verdict is so excessive that it should be set aside.

3. Errors during the trial. (*a*) Before plaintiff rested, his counsel, in the absence of the jury, requested the court to permit the jury to view the premises, to which request defendant's counsel objected. It appears that such permission was granted on a former trial and a verdict for plaintiff for $2,800 set aside on account of improper conduct of the plaintiff in treating the jury to cigars when such view was being had. The court took the request under advisement. Later, and before the close of the proofs, plaintiff's counsel, in the presence of the jury, called attention to this request. The trial court stated that he had "quite a well-settled rule" not to send a jury to view the premises unless by consent of counsel. He further stated that the injuries complained of occurred nearly four years before the trial, that there had necessarily been changes in the building, that the conditions had all been testified to and that "unless by consent of counsel I will not send them out." Defendant's counsel then said:

"My position is this: I am willing to leave it to the discretion of the court. I do not wish to consent or object on the record. It is a matter which is

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peculiarly within your honor's province to determine, and I am willing to be guided by your judgment,"

whereupon the court denied the request. Defendant's counsel urge that the jury must have understood that he "was the one which prevented them from viewing the premises" and that serious prejudice resulted therefrom. This alleged error was considered by the court when the motion for a new trial was submitted. In support of it, defendant called one of the jurors, who testified that this question was discussed in the jury room, and that he thought the jury were influenced thereby. This testimony was clearly incompetent. *Spencer* v. *Johnson,* 185 Mich. 85, and cases cited. The fact that plaintiff's counsel first made the request in the absence of the jury very clearly indicates that it was made in good faith and not for the purpose of creating a prejudice against the defendant. The granting or refusing of it was a matter in the discretion of the court. *Jaddatz* v. *Lumber Co.,* 194 Mich. 273. We are not impressed that what was said by counsel and the court caused any such serious prejudice against the defendant as would justify a reversal of the case.

It is also urged that the jury had access to and read or heard read a newspaper report of the trial, in which it was stated that the verdict on the former trial was $2,800. Such incidents in the trial of causes, unless juries are to be kept closely confined, are bound to occur. It is belittling their intelligence to assume that their verdict was not founded on the proofs submitted to them, particularly in view of the explicit instructions as to damages given them by the court.

(*b*) Plaintiff's counsel was sworn and offered to testify to certain statements made by one Lempke, conceded by defendant to have been in charge of the heavy hammer at defendant's plant. He urged that

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such statements were admissible as against defendant. After quite a lengthy colloquy between court and counsel, during a part of which the jury were excused, the objection of the defendant was sustained by the court. The test as to such matters, as we said in *Ward* v. *De Young*, 210 Mich. 67, is whether counsel was intentionally seeking to inject into the record facts not competent as proof for the purpose of creating a prejudice in the minds of the jury and whether the jury were probably influenced thereby. We find nothing in the record to indicate such an intent on the part of plaintiff's counsel, nor can we infer that what occurred caused prejudice against the defendant.

(*c*) Plaintiff's counsel sought to show by a witness the effect of the jarring caused by defendant's hammer on her house. To this defendant's counsel objected, saying:

"If we could enter into a consideration of other people's buildings we might bring in 75 or 100 different people who own property in the neighborhood, one testify one way and another another; in other words, it is an entirely extraneous inquiry and incompetent."

The question was then withdrawn. Afterwards, defendant's counsel called two witnesses and propounded to them substantially the same question. Error is assigned on the action of the court in sustaining objections thereto. We think no error was committed in doing so. Plaintiff's counsel had closed his case and presumably excused his witnesses called to so testify. Defendant's counsel may not object to a certain line of testimony as inadmissible by plaintiff and after securing its exclusion either by the action of the court or counsel produce similar testimony on its behalf. 22 C. J. p. 198.

Other questions, involving the amendment of the declaration without granting a continuance, the competency of testimony in which witnesses used the ex-

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pression "I guess," and the admission of certain testimony objected to, discussed by counsel, have been carefully considered. The record presents disputed questions of fact, which were fairly submitted to the jury in instructions of which no complaint is made. We find no reversible error.

The judgment is affirmed.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

ROBBINS v. SIMONS SALES CO.

APPEAL AND ERROR—TRIAL BY COURT WITHOUT JURY—WRITTEN FINDINGS NECESSARY TO REVIEW.

In an action tried before the court without a jury, where there was no request for written findings of fact and law and none were filed, under the statute (3 Comp. Laws 1915, § 12586) and the rule (Circuit Court Rule No. 45), the record presents no question which the Supreme Court can review on a writ of error.

Error to Wayne; Tappan (Harvey), J., presiding. Submitted May 2, 1922. (Docket No. 93.) Decided June 5, 1922.

Replevin by Morris Robbins against the Simons Sales Company for the possession of an automobile. Judgment for defendant. Plaintiff brings error. Affirmed.

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Sanders & Metzger, for appellant.

Monaghan, Crowley, Reilley & Kellogg, for appellee.

SHARPE, J. Plaintiff brought replevin for an automobile sold to him by defendant, of which defendant claimed possession under a title retaining contract. At the opening of the trial, plaintiff's counsel "advised the court that his client had chosen not to proceed with the case." Defendant's counsel then waived the return of the vehicle and elected to take judgment for the amount of its special interest therein. Proof of such interest was offered and judgment entered for defendant for $1,250. The case was tried by the court without a jury. There was no request for findings, nor were any made or filed. Plaintiff moved for a new trial, which was denied and the reasons therefor filed. This judgment plaintiff seeks to review by writ of error.

In the early case of *Haines* v. *Saviers*, 93 Mich. 440, this court said:

"He who desires to review in this court a judgment, wherein a trial was had before the court without a jury, and to question the conclusions reached by such court upon the facts and the law, must have a written finding, both of facts and law, and must take his exceptions thereto."

We can but again call attention to the statute (3 Comp. Laws 1915, § 12586) and the rule (Circuit Court Rule No. 45). Among the later cases are *McDonell* v. *Union Trust Co.*, 139 Mich. 386; *Nichol* v. *Ward*, 156 Mich. 136, and *Wilson* v. *Hugus*, 163 Mich. 577. The record presents no question which we can review.

The judgment is affirmed.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

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GENERAL ELECTRICAL ENGINEERING CO. *v.* BRUMM.

1. APPEAL AND ERROR—SPECIAL APPEAL—QUESTION TO BE DETERMINED AS ONE OF LAW.

   Where plaintiff brought two actions against defendant in justice's court on an open account and defendant took a special appeal in each case, alleging as error in the first that the court erred in denying his motion to dismiss for the reason that there was another action pending arising out of the same claim or demand between the same parties, and alleging as error in the second that the court erred in allowing costs against defendant contrary to the statute (3 Comp. Laws 1915, § 14217), the defendant was entitled, when the causes were reached in the circuit, to have the legal questions presented in the special appeals determined as matter of law; an appeal in this respect presenting the characteristics of a certiorari.

2. SAME—MOTION TO DISMISS—PRACTICE—SAVING QUESTION FOR REVIEW.

   Where defendant, instead of calling the attention of the court to said questions and asking for a decision thereon, made a motion to dismiss the first case because of the pendency of the second one, he may not complain of the action of the trial judge in denying the motion and entering an order consolidating the two causes.

3. TRIAL—PRACTICE—MOTION FOR DIRECTED VERDICT PROPERLY DENIED WHERE ISSUE FOR JURY.

   Defendant's motion for a directed verdict in the first case because of the pendency of the second one was properly denied, since plaintiff might sue on such items of the account as it chose, and the only matter which could be considered was its right to recover on the claim presented by its bill of particulars.

4. APPEAL AND ERROR—FAILURE TO RAISE ISSUE IN COURT BELOW—SPLITTING CAUSE OF ACTION—SAVING QUESTION FOR REVIEW.

   Where defendant in the circuit court at no time challenged the right of plaintiff to maintain the second action for the reason that it was splitting its cause of action,

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the question as to whether plaintiff could lawfully bring two actions to recover its claim against defendant is not before the Supreme Court, on error to review a judgment for plaintiff.

5. SAME—ISSUE DEPENDENT UPON PROOF NOT TO BE DISPOSED OF BY MOTION.

Said question could not be raised by motion to dismiss, since its disposition depended upon whether it was supported by the proof.

Error to Wayne; Hunt (Ormond F.), J. Submitted April 7, 1922. (Docket No. 38.) Decided June 5, 1922. Rehearing denied November 2, 1922.

Assumpsit in justice's court by the General Electrical Engineering Company against John B. Brumm for the amount of an open account. There was judgment for plaintiff, and defendant appealed to the circuit court. Judgment for plaintiff. Defendant brings error. Affirmed.

Warren, Cady, Hill & Hamblen (*Charles E. Lewis*, of counsel), for appellant.

Raymond B. Wells, for appellee.

SHARPE, J. The plaintiff brought two suits against defendant in justice's court in the city of Detroit. In the first (No. 3,453) its amended bill of particulars claimed for material furnished between August 5, 1919, and August 27, 1919, and labor installing same, amounting to $941.63, on which it credited defendant for returned material, $149.11, and cash paid, $300. In the second (No. 3,456) it claimed for material furnished on and after August 14th and labor installing same, $320.62, and gave credit for returned material, $6.11. The pleadings do not appear in the record. Judgment was entered in No. 3,453 for plaintiff for $490 and $6.75, costs, and No. 3,456 for $307.90 and $6.75, costs. A special appeal was taken in both cases.

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While there are several assignments of error, counsel for appellant in their brief say:

"The right of the plaintiff to separate the account into two claims constitutes the sole question raised in this brief."

We therefore are at liberty to consider only the rulings made by the trial court wherein such question was raised.

In No. 3,453, the error in respect to the matter here under consideration was thus stated:

"For the reason that the court erred in the denying of defendant's motion to dismiss this cause for the reason that there is another action pending arising out of the same claim or demand, said other action being No. 3,456, between the above named parties before the above named justice of the peace."

In No. 3,456, the error alleged in the affidavit on which the special appeal was founded was the action of the justice in allowing costs against defendant contrary to section 14217, 3 Comp. Laws 1915. When the causes were reached in the circuit, the defendant was entitled to have the legal question presented in the special appeals determined as matter of law. An appeal in this respect presents the characteristics of a certiorari. It does not appear that the attention of the court was called to the matter or a decision asked for. Instead, the defendant filed a motion to dismiss No. 3,453 (Circuit Court No. 78,944) and submitted his affidavit in support thereof. The reasons for dismissal are thus stated:

"(1) For the reason that there is another action now pending in this court between the parties hereto on appeal from judgment rendered by John F. McKinley, one of the justices of the peace in and for the city of Detroit, on April 2, 1920, arising out of and involving the same claim or demand upon which this suit is brought, said other action being No. 78,945, in the circuit court for the county of Wayne.

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"(2) For the reason that the amounts which the plaintiff is seeking to recover in this suit and the other suit mentioned above now pending between the parties in this court, together constitute a part of and are included in an open running account between the parties hereto, said open running account constituting a single and entire demand, which cannot be split into more than one cause of action.

"(3) For the reason that all the items for which the plaintiff seeks recovery in this action are included in the statement of an account rendered by plaintiff to defendant on October 31, 1919, and another action upon said account rendered is now pending in this court between the above parties."

No motion was made in No. 3,456 (Circuit Court No. 78,945). The trial court denied the motion to dismiss and entered an order consolidating the two causes as No. 78,944.

The court's attention was next called to the alleged error by a motion of defendant to direct a verdict in his favor. The reason assigned was that an action other than 78,944 was pending—

"arising out of and involving the same claim or demand upon which the suit in this case (case No. 78,944) is brought, said other action being case No. 78,945, in the circuit court for the county of Wayne."

Other reasons presenting the same question in different language were stated. This motion the court reserved under the Empson act (3 Comp. Laws 1915, § 14568). Defendant preferred requests to charge as though the cases were being tried separately. In 78,944 he asked for a directed verdict for the reasons above stated. In 78,945 his requests related to the law applicable to certain facts in issue. After verdict, a motion *non obstante veredicto* was made, based entirely on the motion to direct a verdict. This was denied and judgment entered for plaintiff.

It will thus be seen that at no time did defendant challenge the right of the plaintiff to maintain the second

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suit for the reason that it was splitting its cause of action, but his contention was that by doing so it could not maintain its first suit. In this claim he was clearly in error. The plaintiff might sue on such items of the account as it chose. The only matter which could be considered in the first suit was plaintiff's right to recover on the claim presented by its bill of particulars. For such amount as was found to be due on these items it was entitled to judgment.

When, however, the second suit came on for hearing, defendant with his plea could have given notice that he would insist on the defense he now raises. This question could not be raised by motion. Its disposition depended upon whether it was supported by the proof.

With considerable reluctance, but impelled by the law which permits us on review by writ of error to consider and pass upon errors alleged to have occurred in the trial in the circuit court only, we must hold that the question as to whether plaintiff could lawfully bring two suits to recover its claim against defendant is not before us. See *Mahiat* v. *Codde,* 106 Mich. 387, and cases cited.

The judgment is affirmed.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

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ROTT *v.* WESTCHESTER FIRE INSURANCE CO.

1. INSURANCE—ARBITRATION—WAIVER.
   A clause in an insurance policy providing that in the event of disagreement as to the amount of the loss or damage the same must be appraised before recovery can be had may be waived by the insurer.

2. SAME—WAIVER—QUESTION FOR JURY.
   In an action on an insurance policy for the loss of an automobile by fire, testimony by plaintiff that defendant's adjuster told him he would have to accept $250 or nothing—that if he did not accept it he could bring suit, *held*, to justify submitting to the jury the question as to whether such conduct amounted to a waiver of the right to an appraisal.

3. SAME—WAIVER BY PAROL EVIDENCE.
   It cannot be said that it is unfair to insurer to permit waiver of arbitration by parol evidence, although expressly provided for in the policy, since insurer may always secure same by making a demand therefor, and thus leave no doubt of its intention to rely thereon.

4. SAME—PROOFS OF LOSS—WAIVER—QUESTION FOR JURY.
   Where a written statement of loss was prepared by the defendant's adjuster and signed and verified by the oath of insured, and the automobile was examined soon after the fire by said adjuster, and no further proof of loss was suggested to or required of insured, the question of waiver of proofs of loss was for the jury.

Error to Wayne; Weimer (George V.), J., presiding. Submitted April 28, 1922. (Docket No. 39.) Decided June 5, 1922.

Assumpsit by David Rott against the Westchester Fire Insurance Company on a policy of insurance. Judgment for defendant *non obstante veredicto*. Plaintiff brings error. Reversed, and judgment entered on verdict.

On arbitration agreements, their validity and binding force, see note in 47 L. R. A. (N. S.) 337.

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Finkelston & Lovejoy (*H. C. Chilson*, of counsel), for appellant.

Frederick J. Ward, for appellee.

SHARPE, J. On July 19, 1917, plaintiff procured insurance in the defendant company on a Studebaker touring car owned by him against loss or damage by fire to the amount of $450. In February, 1918, the building in which the car was stored was consumed by fire. Plaintiff claims the car was totally destroyed. Plaintiff was absent from the city at the time of the fire. On his return a few days later, he informed Mr. Goodman, the agent from whom he had procured the insurance, of his loss. Goodman sent him to Alfred H. Dinning, an authorized adjuster for the defendant. A paper was filled out and verified under oath by plaintiff. Dinning told him to call again in a few days. He did so. Plaintiff testified that Dinning offered him $250 in payment of his loss:

"Says I will give you $250 on this policy; so I asked him I don't see why after this policy is written for $450, why how you give me $250. Well, he says, that is my suggestion, you know that I give you for that, you want $250, all right, if you don't you get nothing. * * * I saw Mr. Dinning, next time he told me that is all I give you, $250, or I don't give you nothing; the company wouldn't give you nothing, you will have to sue for it."

Mr. Dinning testified:

"I went out with Mr. Goodman to look at the remains of the car, and I subsequently offered $250, and told him if he wouldn't accept it we would appraise that loss."

No proofs of loss were furnished by plaintiff nor was an appraisement had or requested by him. The policy contained the usual provision as to the furnish-

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ing of proofs of loss and the following as to an appraisal:

"Appraisal: In the event of disagreement as to the amount of loss or damage, the same must be determined by competent and disinterested appraisers before recovery can be had hereunder." * * *

At the conclusion of plaintiff's proofs, defendant's counsel moved for a directed verdict because proofs of loss had not been furnished and no arbitration had as to the amount of the loss. Decision on this motion was reserved. Proof was then submitted by defendant and at its close the motion for a directed verdict was renewed, reserved and the cause submitted to the jury, who rendered a verdict for plaintiff for $450. On defendant's motion thereafter made, a judgment *non obstante veredicto* was entered in its favor for the reason that the arbitration provision had not been complied with. Plaintiff reviews this judgment on writ of error. The assignments relate to the action of the court in entering such judgment.

1. Arbitration. In *Baumgarth* v. *Insurance Co.*, 152 Mich. 479, 483, it is said:

"It is the established rule in this State that no right of action on the part of an insured exists until an appraisal provided for in the policy has been made."

It is also well established that such a clause may be waived by the insurer. See cases cited under Waivers in note to *Williams* v. *Branning Manfg. Co.*, 47 L. R. A. (N. S.) 337, 425 (154 N. C. 205, 70 S. E. 290).

The jury found that it was waived under instructions of which there is no complaint. Did the testimony of the plaintiff justify the submission of this question to the jury? We feel constrained to hold that it did. The question presented is not what inference we would draw from what the adjuster said, but what inference the plaintiff might fairly have drawn therefrom. The language of the adjuster as

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testified to by plaintiff was a plain invitation to him to begin a suit to recover for his loss unless he would accept the sum offered. It justified a finding that he thereby induced the plaintiff to believe that if, under arbitration proceedings, he should be awarded more than $250, he must bring suit to recover it. If litigation must be resorted to in order to determine liability, the means provided for ascertaining the loss without litigation need not be called into play. While the proofs do not indicate any absolute denial of liability on the part of the defendant, it is suggestive that in the notice attached to the plea the defendant states that it will insist that the policy is void—

"because of false and fraudulent statements and misrepresentations of material facts and circumstances concerning this subject of insurance, and because of fraud and false swearing upon matters relating to said insurance."

From this claim, though not then advanced, an inference might be drawn that the offer made was one of compromise and not simply based on the fair judgment of the adjuster as to the amount of the loss. In *Gnau* v. *Accident Ass'n*, 109 Mich. 527, the question of a waiver of a provision for arbitration was involved. We quote from the opinion at page 533:

"The court charged the jury, substantially, that the right to arbitrate might be waived by the defendant, and if they found by the evidence that the company did not agree to arbitrate, or that, by any statement made by it, it was shown to be willing to go into court, and adjust the matter with the plaintiff in a court of law, and that position was taken by the company, or the authorized agent of the company, in dealing with Mr. Gnau in relation to the claim, the jury might find that the company thus refused to arbitrate. The court then said:

"'It is not necessary that this refusal should be made in any express terms, but by the action or conduct of the defendant or its agents, if it expressed its willingness to try this case

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in court, that would amount to a waiver, and that the terms of this policy had been complied with. * * * It is your privilege, if you find those facts that will justify it, to say whether or not this defendant did refuse to arbitrate, within the meaning of this policy and these by-laws.'"

The conclusion reached was that the question of waiver was fairly submitted to the jury.

A quite similar question was presented in *Cullen* v. *Insurance Co.*, 126 Mo. App. 412 (104 S. W. 117). In that case an effort at adjustment was made, in the course of which the adjuster said to the insured:

"We have decided to give you one hundred dollars for the total lost goods, and if you refuse to accept that, we won't give you anything. You can go ahead and do whatever you please."

The court said:

"Under all of the authorities with which we are familiar, the operation of the arbitration clause in such policies is always deferred until the company has, in good faith, made a reasonable effort to agree with the insured on the amount of the loss; otherwise it would serve as a trap and a snare for the innocent and unwary. *Boyle's Sons* v. *Insurance Co.*, 169 Pa. 349 (32 Atl. 553); *Vangindertaelen* v. *Insurance Co.*, 82 Wis. 112 (51 N. W. 1122, 33 Am. St. Rep. 29); *Phœnix Ins. Co.* v. *Badger*, 53 Wis. 283 (10 N. W. 504); *Farnum* v. *Insurance Co.*, 83 Cal. 246 (23 Pac. 869, 17 Am. St. Rep. 233); *Schrepfer* v. *Insurance Co.*, 77 Minn. 291 (79 N. W. 1005); *Hickerson* v. *Insurance Co.*, 96 Tenn. 193 (33 S. W. 1041, 32 L. R. A. 172). Certainly an arbitrary declaration on the part of the company that unless the insured would agree to accept one hundred dollars in full for the goods totally destroyed, no further attention would be given the loss, and that he might appeal to the courts for relief, does not evince a reasonable effort in good faith on its part to ascertain the amount of the loss so as to invoke the operation of the clause referred to. On the evidence, the court properly referred this question to the jury."

It may be urged that the effect of permitting this

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provision in the policy to be, in effect, eliminated therefrom by parol evidence is unfair to the insurer for whose benefit it is inserted. But the insurer may always secure an arbitration by making a demand therefor. And such demand may be made in writing and in terms so clearly expressed as to leave no doubt of its intention to rely on such provision, should the insured refuse or neglect to comply therewith.

2. Proofs of loss. Was the verdict properly directed because proofs of loss were not furnished? A written statement was prepared by the adjuster and signed and verified by the oath of the insured. The loss was confined to an automobile. It was examined soon after the fire by defendant's adjuster. No suggestion was made to plaintiff by either the adjuster or the agent, Mr. Goodman, that other or further proof of loss was required. We think, under the rule laid down in *Gristock* v. *Insurance Co.*, 84 Mich. 161, the question of waiver was for the jury. It was there said:

"If the conduct and acts and conversation of the adjuster would induce an honest belief on the part of Mr. Gristock that the proofs that were being made, and the certificates that were being furnished, and the negotiations that were being had, were all that were required by the company, and that Mr. Gristock acted with an honest belief that these were all the company required, and that he was warranted from the facts in entertaining that belief in good faith, as a reasonable man, then the jury would be justified in finding that the formal proofs of loss were waived on the part of the company."

The judgment entered is reversed and set aside and the record remanded to the circuit court with directions to enter judgment upon the verdict of the jury. The plaintiff will recover his costs of both courts.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

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ALTFATHER *v.* BLOOM.

1. HOMESTEADS — EQUITY — DEEDS — CANCELLATION — PARTIES — ESTOPPEL.

   In a suit by a son to set aside a deed of a house and lot by his father to his house-keeper, who in turn conveyed to defendants, on the ground that the earnings of himself and sister were used to help pay for same, that it was a homestead, and that his father could not convey same without consent of his wife who was insane, where it appears that plaintiff and his sister had knowledge of said conveyance, that the wife is not a party seeking relief, and that the purchasers of the property acted in good faith and paid full value therefor, plaintiff has no standing in a court of equity.

2. CANCELLATION OF INSTRUMENTS — DEEDS — PARTIES.

   Where the grantee in a deed to a lot claimed by plaintiff to have been deeded by him to the grantor as security merely was not a party to the suit to set said deed aside, his interest in said lot cannot be adjudicated.

3. APPEAL AND ERROR — INSURANCE — BENEFICIAL ASSOCIATIONS — RIGHT TO PROCEEDS OF POLICY — EVIDENCE — STATUTES — ASSUMPTION.

   Where neither the policy issued by a fraternal insurance company nor the by-laws of the company appear in the record, and the court may not assume that it was issued pursuant to the provisions of the statute relating thereto (2 Comp. Laws 1915, § 9393), the Supreme Court is unable, on the record, to make a decree involving the rights which have accrued thereunder.

4. ESTATES OF DECEDENTS — ACCOUNTING.

   Money belonging to the estate of a deceased person is subject to the provisions of her will, and therefore plaintiff, as an individual, is not entitled to an accounting therefor of the person in whose hands it is held.

Appeal from Wayne; Mandell (Henry A.), J. Submitted April 12, 1922. (Docket No. 58.) Decided June 5, 1922.

On rights of child in parent's homestead, generally, see note in 56 L. R. A. 33.

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Bill by Frank Altfather against Augusta Bloom and others for an accounting and to set aside a deed. From a decree dismissing the bill, plaintiff appeals. Affirmed.

Charles C. Stewart and *W. C. Gottman,* for plaintiff.

SHARPE, J. The plaintiff is the son of Adam Altfather and Augusta Altfather. The father died on February 14, 1918. The mother was committed to the Wayne county insane asylum at Eloise on December 6, 1897. She was afterwards transferred to the Michigan farm colony for epileptics at Wahjamega. Soon after such commitment, Pauline Altfather, a cousin of Adam, came to live at his home and thereafter was apparently recognized and treated as his wife. The plaintiff and his two sisters, Anna and Helena, are children of Adam and Augusta. They were minors at the time Pauline came to the home. They resided there until their marriage.

It is plaintiff's claim that his father was in poor health and that he and his sisters began to work for others at an early age; that their earnings were turned over to Pauline, who handled all moneys and provided for the home and its inmates. In his testimony he speaks of Pauline as his "stepmother." In 1904 a house and lot on 31st street in Detroit was purchased under contract from William J. Gray, trustee, the father being named as vendee therein. He and Pauline resided there until his death. In April, 1908, Adam borrowed $700 from Dr. Charles Gottman. With this money the land contract was paid up and the deed taken in Dr. Gottman's name as security for the loan. It is plaintiff's claim that his earnings and those of his sister Anna were used to repay this loan. On May 29, 1911, Dr. Gottman conveyed the property to Adam and Pauline, "to be held as joint tenants and

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not as tenants in common." On November 1, 1913, Adam executed a quit-claim deed of the premises to Pauline. On November 6, 1919, Pauline conveyed the property to the defendants Michael Novack and Mary Novack, his wife, who immediately entered into possession thereof. While the consideration expressed in this deed is one dollar, it is their claim that they paid $3,500 therefor. The bill alleges that Pauline was induced to sign this deed by the defendant Augusta Bloom. The bill alleges that after Adam's death the sisters of plaintiff were about "to take proceedings to secure their rights in the said estate" and that plaintiff at the request of Pauline induced them to refrain from doing so, on her promise to make a will devising and bequeathing all her property to him and on his promise to divide it equally among the three of them. On February 28, 1918, fourteen days after Adam's death, Pauline executed a will, apparently pursuant to this agreement, whereby she devised and bequeathed all her estate to the plaintiff, subject to a bequest of five dollars to each of his sisters. After his father's death in 1918, plaintiff continued to reside in the home with Pauline until August 30, 1919, when he married. He and his wife remained there about a month and then took rooms out Woodward avenue nearer to his work at the Ford plant. Prior to this, and in 1916, plaintiff purchased a lot in the Taylor subdivision in Detroit, paying $650 therefor. Being desirous of purchasing an automobile, in September of that year he borrowed $250 of Pauline and deeded this lot to her as security for such loan. Plaintiff claims to have paid back this loan except $50 before he left the home in 1919. About 20 years before her death, Pauline took out a fraternal policy of insurance in which the plaintiff was named as a beneficiary. It provided for a death benefit of $500. Plaintiff claims to have paid the assessments on this

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policy for many years. The defendant Augusta Bloom lived near the Altfather home. It is her claim that she rendered considerable service to Pauline and in the home and that after plaintiff left, and in November, 1919, Pauline asked and was granted permission to live with her; that Pauline was then ill, had fainting spells, and needed attention; that she offered to and did turn over to Mrs. Bloom the fraternal insurance certificate, the proceeds to be used in paying the expenses of Pauline's last illness and burial. These amounted to $424.40, some of which had been paid. Pauline died on January 25, 1920. On January 10th of that year, she conveyed the lot which had been deeded by plaintiff to her to Mrs. Bloom. It is the claim of Mrs. Bloom that this conveyance was made in consideration of the service she had rendered Pauline and her promise to "take care of her grave" so long as she lived. This conveyance was subject to a contract for the sale of the lot executed by Pauline in October, 1919, to Charles Sternberger. The consideration named was $1,200. Three hundred and ten dollars had been paid prior to the death of Pauline and after her death he paid Mrs. Bloom $500 in cash and conveyed to her his equity in another lot and received a deed therefor.

We have stated the claims of the parties as disclosed by the bill of complaint and the testimony submitted at the hearing. The relief sought is:

(1) An accounting by Augusta Bloom of all money and property of Pauline that has come into her hands, "and requiring her to surrender up the same to this plaintiff."

(2) An injunction restraining her from claiming or receiving the death benefit under the fraternal certificate "until the true ownership of the same shall be judicially determined by this court."

(3) The setting aside of the deed of the home to the Novacks and "that same may be decreed to be the

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property of this plaintiff * * * in trust for himself and his two sisters" and the deed to Mrs. Bloom of the other lot and that it be decreed to be the property of plaintiff.

1. We consider these claims in the inverse order to that stated. The trial court found:

"I have heard no attack made upon Novack's title as being fraudulently secured. No one has even intimated that he was not an innocent purchaser for value."

It is plaintiff's claim that when the father, Adam, was named as vendee in the land contract executed by Mr. Gray and the family moved therein the premises became a homestead and subject to the law applicable thereto; that as the family continued to reside thereon, the subsequent conveyances, in none of which Augusta Altfather, the wife of Adam, joined, were ineffectual to transfer the property and void. He relies on *McKee* v. *Wilcox*, 11 Mich. 358 (83 Am. Dec. 743); *H. Stern, Jr., & Bros. Co.* v. *Wing*, 135 Mich. 331, and *Allen* v. *Crane*, 152 Mich. 380 (16 L. R. A. [N. S.] 947), to support this claim. The widow of Adam is not here asking for relief against these transfers. The plaintiff and his sisters had knowledge of them when made. Proceedings to set them aside were contemplated by them soon after the father's death in 1918. Reliance was placed on the promise of Pauline to protect plaintiff's rights in a will which she promised to and did make. Plaintiff knew that Pauline was regarded as Adam's wife. He also knew that in the deed from Adam to Pauline, executed in 1913, he was described as her husband. It would be a grave injustice to now permit him to attack the conveyance to the Novacks, for which they apparently have paid full value, for the reason stated. The record of conveyances showed a perfect title in Pauline at the time the deed was made and the Novacks pur-

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chased in reliance thereon. We think plaintiff has no standing in a court of equity to attack the Novack conveyance.

2. Mr. Sternberger is not a party to this suit and his interest in the lot deeded to him by Mrs. Bloom cannot be adjudicated.

3. It appears that Adam was named as the beneficiary in the fraternal insurance policy when first issued. On December 28, 1918, it was surrendered and a new one issued in which plaintiff was named as beneficiary. On November 18, 1919, this policy was surrendered and a new one issued to Augusta Bloom. Neither the policy nor the by-laws of the company appear in the record. The grand secretary testified:

"Under the by-laws of our organization, the person is permitted to change the beneficiary at will any time they shall so desire."

Plaintiff claims that blood relatives only could be named as beneficiaries unless it appeared that the member had no such relative (2 Comp. Laws 1915, § 9393). On this record we feel unable to determine the merits of the claim made by plaintiff. We have not the policy before us and cannot assume, as does plaintiff's counsel in his argument, that it was issued pursuant to the provisions of this statute. It would appear that its purpose was to provide for the expenses of the last illness and burial of the member. The expenses thereof almost equal the amount payable under the policy. We feel unable on this record to make any decree involving the rights which have accrued thereunder.

4. Plaintiff as an individual is not entitled to an accounting on the part of Mrs. Bloom of any moneys in her hands belonging to Pauline at the time of her death. Such moneys would clearly belong to Pauline's estate and be subject to the provisions of the will made by her, which has been duly admitted to pro-

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bate. The record does not disclose what, if any, further proceedings have been taken to administer the estate.

We agree with the trial court that the record affords no ground for granting equitable relief to plaintiff. The decree dismissing the bill of complaint is affirmed. The defendants not having filed a brief in this court, no costs are allowed.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, MOORE, and STEERE, JJ., concurred.

LA LONDE *v.* BLOOM.

HOMESTEADS—ALIENATION BY HUSBAND VOID WITHOUT ASSENT OF WIFE IN WRITING—CONSTITUTIONAL LAW.

A contract whereby a father agreed that the homestead should go to a son at the death of the survivor of himself and wife, where not assented to by the wife in writing, is void under Art. 14, § 2, of the Constitution.

Appeal from Bay; Houghton (Samuel G.), J. Submitted April 4, 1922. (Docket No. 2.) Decided June 5, 1922.

Bill by John LaLonde and another against Antoinette Bloom for the specific performance of a land contract. From the decree rendered, all parties appeal. Reversed, and bill dismissed.

Dudley J. Kavanagh, for plaintiffs.

Coumans & Gaffney, for defendant.

On power of husband to create easement in homestead without wife's consent, see note in 27 L. R. A. (N. S.) 963.

On power of legislature to take away husband's right to convey or encumber homestead property, see note in 36 L. R. A. (N. S.) 1029.

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MOORE, J. This is a bill of complaint filed February 25, 1921, for specific performance. John LaLonde is the son of the defendant. Lea LaLonde is the wife of John.

The chancellor made a decree reading in part as follows:

"It appears to the court by such pleadings and proofs that some such agreement as mentioned in the bill of complaint in this cause made by and between said plaintiffs and Julian LaLonde, deceased, and the defendant on or about the 24th day of June, 1902, whereby deceased and defendant agreed that title to the land and premises described as * * * containing five acres of land, more or less, was to pass to plaintiff John LaLonde at the death of the survivor of Julian LaLonde and defendant, and that plaintiffs in consideration thereof were to live with deceased and defendant and work said described land and other land belonging to deceased and defendant. * * *

"Now therefore in consideration thereof, it is ordered, adjudged and decreed and this court doth hereby order, adjudge and decree that the title in and to said real estate remain *in statu quo* till the death of said defendant and that in the meantime the said plaintiffs continue to perform their part of such agreement till the death of defendant in so far as they may not be prevented from so doing by the defendant."

Both parties have appealed.

The counsel for the defendant contend there are two legal questions involved:

"(1) Was John LaLonde a competent witness to prove the claimed agreement with Julian LaLonde, or in other words, is such testimony prohibited by section 12553, 3 Comp. Laws 1915?

"(2) Inasmuch as it is undisputed that the premises described in the bill of complaint were the homestead of defendant, any agreement made by Julian LaLonde during his lifetime was void, because of the failure of Antoinette LaLonde to join therein in writing as required by the provisions of section 2, article 14 of the Michigan Constitution."

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In the reply brief for the plaintiffs counsel says:

"Plaintiffs desire the relief prayed for in their bill of complaint, viz.:

"That the court decree defendant to be the owner of a life estate in the real estate described in the bill of complaint, and the plaintiffs the owners of the remainder in fee therein.

"If defendant's contention that the contract was void because it lacked the wife's signature and it concerned the homestead, must prevail, then the plaintiffs respectfully pray that a decree be entered allowing them compensation for services and improvements and giving them a lien on the real estate in question for such allowances over and above the homestead exemption." Citing *Fleming* v. *Fleming*, 202 Mich. 615, and *Klett* v. *Klett*, 175 Mich. 224.

There is no averment in the bill of complaint that the five acres mentioned exceed the value of the homestead exemption as fixed by the Constitution.

Section 2, article 14, of the present Constitution of Michigan, reads in part as follows:

"Such exemption shall not extend to any mortgage thereon lawfully obtained, but such mortgage or other alienation of such land by the owner thereof, if a married man, shall not be valid without the signature of his wife to the same."

This provision of the Constitution has been construed by this court many times. Some of the cases are cited in the notes to the constitutional provisions found in 1 Comp. Laws 1915 at pages 190 and 248. It has been repeatedly held that the homestead could not be alienated without the written assent of the wife. See *Township of Jasper* v. *Martin*, 161 Mich. 336 (137 Am. St. Rep. 508); *Holley* v. *Horton*, 164 Mich. 31; *Way* v. *Root*, 174 Mich. 425; *Klett* v. *Klett*, 175 Mich. 224; *Agar* v. *Streeter*, 183 Mich. 600 (L. R. A. 1915D, 196, Ann. Cas. 1916E, 518); and we think it must be so held in the instant case. It is

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unnecessary to pass upon the other questions suggested by counsel.

A decree may be entered dismissing the bill of complaint, without prejudice, with costs to the defendant.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

PEOPLE v. FOREMAN.

INTOXICATING LIQUORS—CRIMINAL LAW—SEARCHES AND SEIZURES—CONSTITUTIONAL LAW—QUESTION FOR JURY.

In a prosecution for violating the liquor law, where it was conceded that the officer searched defendant's grip without a search warrant and without a warrant for his arrest, but the officer claimed that defendant invited him to search the grip, which was denied by defendant, the trial judge should have instructed the jury that said search was illegal under Art. 2, § 10, of the Constitution, unless defendant invited the officer to do so.

Exceptions before judgment from Ottawa; Cross (Orien S.), J. Submitted April 14, 1922. (Docket No. 129.) Decided June 5, 1922.

William Foreman was convicted of violating the liquor law. Reversed.

Daniel F. Pagelsen, for appellant.

Fred T. Miles, Prosecuting Attorney, for the people.

On constitutional guaranties against unreasonable searches and seizures as applied to a search for or a seizure of intoxicating liquor, see notes in 3 A. L. R. 1514; 13 A. L. R. 1316.

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MOORE, J. The defendant was convicted with having on the 25th day of July, 1921, in his possession a gallon of whisky. Mr. Foreman had stepped off an interurban car in the city of Grand Haven with a grip in his possession. A police officer spoke to him as he got off the car, saying: "Say, Bill, wait a minute, I want to talk to you." The defendant did not stop and the witness followed him into the hotel in the city of Grand Haven, with the result that the officer took from the grip a bottle containing moonshine whisky. The officer had no search warrant and no warrant for the arrest of the defendant. It is the contention of the defendant that the officer had no right to search the grip without a search warrant, and, having no warrant for the arrest of the defendant, the evidence that was given upon the trial of the cause was illegally obtained and in violation of the rights of the defendant. The case is here on exceptions before sentence.

The assignments of error may be grouped under three heads:

(1) Error on the part of the court in denying the motion to quash.
(2) Admission of testimony tending to prove that the contents of the jug were moonshine whisky.
(3) Failure of the court to instruct the jury as requested by the defendant.

The judge was requested to charge the jury as follows:

"I charge you, gentlemen of the jury, that if you find from the evidence in this case that the officer, at the time he made the search of the grip here in question, was not armed with a search warrant, did not have a search warrant authorizing him to search this grip, then you must disregard all of the evidence introduced in this case and your verdict must be not guilty."

In place thereof the court instructed the jury:

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"If you find from the evidence in this case and beyond a reasonable doubt that on the 25th day of July, 1921, in the city of Grand Haven, in this county, respondent unlawfully had in his possession certain spirituous and intoxicating liquor, to-wit, a gallon of moonshine whisky, then he is guilty of the offense herein charged against him."

The only witness sworn was the officer who made the arrest. We quote some of his testimony:

"That he first saw Bill that day on the interurban coming into the city of Grand Haven at the Gildner Hotel on the corner of Washington and Water streets. That he had a conversation with him at that time. That Bill got off the front end of the car and witness got off the rear and went to the front and hollered at him saying, 'Say, Bill, wait a minute, I want to talk to you,' and he kept right on, and I caught up to him. I asked him what he had in that grip, and he still continued to walk and he said 'I have clothes in here,' and he walked into the hotel to the foot of the stairs, in the lobby. This was the Gildner hotel. He set his grip down and said, 'I will show you that I have clothes,' opened his grip, took out a shirt, and under that shirt was a piece of cardboard, and I lifted up the cardboard and found that gallon of whisky. This is the piece of cardboard here in court. The shirt was on top.

"*Q.* When you stopped him in the hotel, he opened the grip and pulled out the shirt and said to you, 'See, that is what I have got,' holding up the shirt, did he not?

"*A.* He says, 'See, I have clothes.'

"*Q.* Didn't he say 'See, that is what I have got?'

"*A.* He says clothes.

"*Q.* And held up the shirt?

"*A.* He told me he had clothes.

"*Q.* But he showed you the shirt, he held up the shirt and says 'See, that is what I have got,' didn't he?

"*A.* He says, 'See, that is my clothes.'"

The officer was subjected to a long cross-examination and his answers were frequently evasive. He

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sought to convey the impression that he was invited by the defendant to search his grip, while it is contended by the appellant that the conversation was not an invitation to search the grip, but was a representation that what the grip contained was defendant's clothes. It is insisted that the Constitution was violated, counsel quoting:

"The person, houses, papers and possessions of every person shall be secure from unreasonable searches and seizures. No warrant to search any place or to seize any person or things shall issue without describing them, nor without probable cause, supported by oath or affirmation." Constitution, art. 2, § 10.

It is conceded there was no search warrant, but it is insisted there was an invitation to search the grip. Some of the cases bearing upon the questions involved are *People* v. *Marxhausen*, 204 Mich. 559 (3 A. L. R. 1505); *People* v. *DeLaMater*, 213 Mich. 167; *People* v. *Mayhew*, 214 Mich. 153; *People* v. *Halveksz*, 215 Mich. 136.

The jury should have been instructed by the judge that as the officer had no warrant for the arrest of defendant and no search warrant that he had no right to search the grip unless he was invited to do so, and that in the absence of such invitation they should find the defendant not guilty.

The case is reversed, and a new trial ordered.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

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LOEW *v.* HAYES MANUFACTURING CO.

1. MASTER AND SERVANT—CONTRACTS—CONSTRUCTION—OFFER AND ACCEPTANCE.

   An offer in a contract of employment reading "We will agree to pay you at the rate of $6,000 the first year, $6,600 the second year, and $7,200 the third year," may fairly be inferred to contemplate a hiring for three years, and, when accepted, will be construed to result in a hiring for three years.

2. SAME—DISCHARGE OF EMPLOYEE—JUSTIFICATION—QUESTION FOR JURY.

   The question as to whether defendant employer was justified in terminating plaintiff's employment before the expiration of the contract was properly submitted to the jury, under the evidence.

3. CORPORATIONS—AUTHORITY OF PRESIDENT TO CONTRACT—QUESTION FOR JURY.

   The question as to whether the president of defendant corporation had authority to make a three-year contract of employment with plaintiff, *held*, under the evidence, properly submitted to the jury.

Error to Wayne; Webster (Arthur), J. Submitted April 28, 1922. (Docket No. 80.) Decided June 5, 1922.

Assumpsit by Oscar A. Loew against the Hayes Manufacturing Company for breach of a contract of employment. Judgment for plaintiff. Defendant brings error. Affirmed.

Beaumont, Smith & Harris (*Charles Wright, Jr.*, of counsel), for appellant.

Stellwagen, MacKay & Wade, for appellee.

On duration of contract of hiring which specifies no term, but fixes compensation at a certain amount per day, week, month, or year, see notes in 25 L. R. A. (N. S.) 529; 51 L. R. A. (N. S.) 629.

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MOORE, J. In December, 1917, the plaintiff was a resident of Cleveland. He received a letter reading as follows:

"HAYES MANUFACTURING COMPANY
Manufacturers of
Automobile Sheet Metal Parts and Bodies
General Offices, Detroit, Mich.
Phone, Walnut 400.

"Detroit, Mich., December 3, 1917.

"Mr. O. E. LOEW,
"1250 W. 76th Street,
"Cleveland, Ohio.

"*Dear Mr. Loew:* (All statements or agreements contained in this letter are contingent on strikes, accidents, fires or any other causes beyond our control.)

"As per our conversation yesterday we will agree to employ you at the rate of six thousand dollars ($6,000.00) the first year, sixty-six hundred dollars ($6,600.00) the second year and seventy-two hundred dollars ($7,200.00) the third year—same payable monthly in case you decide to come with us.

"Your work will consist generally of tool designing, special machinery, engineering and other things pertaining to your line of work, and no doubt can be of great assistance to us in our sales department in obtaining new business.

"In other words I feel that you should be a 'free lance' to be at the service of the writer and it might be necessary to occasionally visit the Hayes-Ionia factories at Grand Rapids and Ionia, Michigan, on some consultation work, etc.

"I trust you will be in position to accept our offer and awaiting your reply, remain

"Yours very truly,
"HAYES MANUFACTURING COMPANY,
"H. J. HAYES (Signed)
"Ass't. to President."

The plaintiff accepted the offer contained in the letter in writing and entered upon his employment January 3, 1918, and continued to work until June 13, 1918, when he was discharged. He sued to recover damages. The case was tried before a jury.

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He had a verdict and judgment in the sum of $8,200. The case is brought here by writ of error.

We quote from the brief of counsel:

"The questions presented by the record and assignments of error and which are raised by the defendant as reasons why the judgment should be reversed, are as follows:

"(1) The contract is not a contract for three years but a contract for an indefinite period only.

"(2) The court should not have construed the contract with the aid of surrounding facts and circumstances.

"(3) The defendant was justified in terminating plaintiff's employment.

"(4) Mr. Hayes had no authority to make a three year contract of employment on behalf of defendant."

1. Counsel state their claim under this head very tersely as follows:

"The contract states that the plaintiff is employed 'at a rate' of compensation. It does not state that he is employed for one year or any other period. The company does not agree to pay him this compensation for each of the three years mentioned, but at the rate of certain yearly amounts for each of the three years in case he is there. An increased scale is provided for in case the plaintiff remains in defendant's employ during the periods mentioned. It is a contract fixing the rate of compensation but not fixing the term of employment."

Defendant insists it could terminate the contract at will if it desired and cites in support of its contention *Martin* v. *Insurance Co.*, 148 N. Y. 117 (42 N. E. 416); *Stein* v. *Kooperstein*, 102 N. Y. Supp. 578; *Orr* v. *Ward*, 73 Ill. 318; and other authorities cited in the brief of counsel.

It must be admitted there is a conflict in the authorities. In Massachusetts the rule is not as contended for the appellant. We quote from *Maynard* v. *Royal Worcester Corset Co.*, 200 Mass. 1 (85 N. E. 877), as follows:

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"The evidence was somewhat conflicting, but having regard only to its aspects most favorable to the plaintiff (as we must in passing upon the action of the judge of the superior court), would justify a finding that he had been in the employ of the defendant for several years, with the duty, among others, of figuring costs; he was also a director of the company, and always received his pay weekly; the financial year of the defendant began on the first day of December, and on December 9, 1904, its board of directors voted that the salaries of the president, treasurer, clerk, one Bennett and the plaintiff 'be increased twenty per cent. on the amount of their salaries for the year 1904;' a short time thereafter a single payment for the amount so voted for the year then just ended was made to the plaintiff; under date of December 20, 1905, the defendant's board of directors passed a vote respecting the same persons, that their 'salaries * * * be increased twenty per cent. on the amount of their present salaries for the year 1905;' on December 12 or 14, 1906, the treasurer of the defendant said to the plaintiff, 'Mr. Fanning requests me to say your salary for the coming year will be $5,000, and he also wished me to state that your last year's salary will be $5,000;' the salary for the year preceding had been $4,000, and $1,000 was immediately paid to the plaintiff, and the weekly payments thereafter made were on the basis of $5,000 per year; about the middle of September, 1907, Mr. Fanning, the president of the defendant who was authorized to employ and discharge employees and fix their salaries, said to the plaintiff, that unless he changed certain conditions, his contract would terminate January 1, to which the plaintiff replied, 'If you wish * * * I will accept and make my plans accordingly January first.' In the latter part of September the plaintiff was discharged without adequate cause.

"Whether there is a contract for services for a definite period of time in any case depends upon all the attendant conditions surrounding the agreement, as well as upon its terms, when the latter are not specific and clear. Several features tend to support the contention that the plaintiff was employed for a year from the first of December, 1906. For three years at least there had been an annual readjustment

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of compensation early in December. Where there has been a recognition of annual employment, the bare continuance of service after the expiration of the term without anything being said is of some importance in the inquiry, whether the contract of service is renewed by implication for the like period. *Dunton* v. *Derby Desk Co.*, 186 Mass. 35 (71 N. E. 91). The word 'salary' was used both in the vote of the board of directors for the years 1904 and 1905 and in the conversation between the treasurer of the defendant and the plaintiff, in describing the compensation which the plaintiff was to receive. This word is perhaps more frequently applied to annual employment than to any other, and its use may import a factor of permanency. *Henderson* v. *Koenig*, 168 Mo. 356 (68 S. W. 72, 57 L. R. A. 659); *People* v. *Myers*, 11 N. Y. Supp. 217. See *sub nomine* Burrill's Law Dictionary. The unit of time used in describing the compensation was one year. In many jurisdictions this fact standing alone is regarded as sufficient evidence of the term of employment, and perhaps this is the implication of *Nichols* v. *Coolahan*, 10 Metc. (Mass.) 449. Although some courts hold that a hiring at so much a year, where no time is specified, is indefinite and may be terminated at will (see *Martin* v. *Insurance Co.*, 148 N. Y. 117 [42 N. E. 416]; *Pinckney* v. *Talmage*, 32 S. C. 364; *Prentiss* v. *Ledyard*, 28 Wis. 131; *Haney* v. *Caldwell*, 35 Ark. 156; *Parlett* v. *Guggenheimer*, 67 Md. 542 [10 Atl. 81, 1 Am. St. Rep. 416]; *Orr* v. *Ward*, 73 Ill. 318; *The Pokanoket*, 84 C. C. A. 49, 156 Fed. 241), the weight of authority is that this circumstance alone, in the absence of any other consideration impairing its weight, will sustain a finding that there was a hiring for that period. *Emmens* v. *Elderton*, 4 H. L. Cas. 624, 640; *Buckingham* v. *Surrey & Hants Canal Co.*, 46 L. T. (N. S.) 885; *Foxall* v. *International Land Credit Co.*, 16 L. T. (N. S.) 637; *Chamberlain* v. *Detroit Stove Works*, 103 Mich. 124; *Beach* v. *Mullin*, 5 Vroom [N. J. Law], 343; *Moss* v. *Decatur Land Improvement & Furnace Co.*, 93 Ala. 269 (9 South. 188, 30 Am. St. Rep. 55); *Young* v. *Lewis*, 9 Tex. 73; *Kellogg* v. *Insurance Co.*, 94 Wis. 554, 558 (69 N. W. 362); *Magarahan* v. *Wright*, 83 Ga. 773 (10 S. E. 584); *Smith* v. *Theobald*, 86 Ky. 141, 146 (5 S. W. 394); *Kirk* v. *Hartman*, 63 Pa.

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St. 97; *Luce* v. *San Diego Land & Town Co.* (Cal.), 37 Pac. 390; *Horn* v. *Western Land Ass'n*, 22 Minn. 233; *Cronemillar* v. *Duluth-Superior Milling Co.*, 134 Wis. 248 (114 N. W. 432); *Jones* v. *Vestry of Trinity Parish*, 19 Fed. 59. Without reviewing the cases or analyzing the principles to determine which is the sounder view, it is enough to say that the use of the sum of money equivalent to a year's pay, in describing the amount which the plaintiff was to receive, was proper for consideration in connection with other incidents. The length of the term of service reasonably inferable as the understanding of the parties, from their words, course of dealing and other acts, was a fact to be determined upon all the evidence. Grouping all these circumstances, and giving them the color most favorable to the plaintiff, as the trial judge had a right to do, we cannot say that his finding, that the contract alleged in the first count was made, was unjustified. *Tatterson* v. *Suffolk Manfg. Co.* 106 Mass. 56."

See, also, *Franklin Mining Co.* v. *Harris*, 24 Mich. 115; *Graves* v. *Lyon Bros. & Co.*, 110 Mich. 670; *Chamberlain* v. *Detroit Stove Works*, 103 Mich. 124.

We do not think the language of the contract is ambiguous. When it is said: "We will agree to pay you at the rate of $6,000 the first year, $6,600 the second year, and $7,200 the third year" it is fairly inferable that a hiring for three years is contemplated and offered and, when accepted, it is a hiring for three years; and we so construe the language used.

This conclusion makes it unnecessary to discuss the second question raised by counsel for appellant.

3. Was the defendant justified in terminating plaintiff's employment? This was a question of fact. We have a record of more than 400 pages. The great bulk of this record is devoted to testimony bearing upon the question stated under this head. The question was submitted to the jury upon a fair charge in which the court gave defendant's written requests

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bearing upon that subject. The jury found in favor of the plaintiff.

4. Did Mr. Hayes have authority to make a three-year contract of employment on behalf of defendant. It is claimed he did not by the appellant. We quote from the brief:

"The by-laws of the company provide that the management of the affairs of the company shall be vested in a board of nine directors. The board shall determine who has power to sign contracts and has power to delegate any power in current business to any committee or officer. The president shall have general supervision over the affairs of the company subject to the board of directors. In 1909 the board passed a resolution to the effect that where it was necessary to sign contracts with employees that the opinion of members of the board regarding such contracts should be secured previous to signing same. This resolution has never been changed."

Mr. Hayes was president of the defendant company when the letter was written and had been for years. He was sworn as a witness. We quote some of his testimony:

"Mr. Smith was very active with the Hayes Manufacturing Company, in fact was our counsel, and I took up all these matters with him. I had a conversation with Mr. Smith regarding the contract of employment between the Hayes Manufacturing Company and Mr. Loew. I do not recall the date but it was before Mr. Loew was hired. Mr. Smith was a director of the company at that time.

"I had a conversation with Mr. Carrow in the latter's office about the contract of employment between the Hayes Manufacturing Company and Mr. Loew sometime before Mr. Loew was employed. Mr. Carrow was secretary and treasurer of the company and also a director. There were seven directors in all. Besides Mr. Smith, Mr. Carrow and myself they were: Mr. H. H. Sanger, connected with the National Bank of Commerce; Mr. Frank W. Blair, of the Union Trust Company; Mr. James H. Flynn; and Mr. Carleton Higbie, a broker of this city. * * *

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"Mr. Sanger was vice-president and acted as president during my absence at the directors' meetings. He did not take any more active part. Mr. Blair, Mr. Flynn and Mr. Higbie were not active. Mr. Smith was active in the affairs of the company in the fall of 1917 and the first six months of 1918. The company was in war work. We were in Washington together trying to get contracts. He was not as active however as Mr. Carrow, who was the secretary and treasurer and devoted all his time to the affairs of the company."

Mr. Hayes testified in great detail as to the many and the important contracts he made on the part of the company. The trial judge charged the jury in part as follows:

"The first question for your consideration is this: Is this agreement the agreement of the defendant company? Unless it is they are not liable in this action. The determination of this question depends upon whether Mr. Hayes, president of the defendant company, had implied authority to enter into the contract, and if he did not have such implied authority, then was the agreement made without authority, afterwards ratified by the defendant company?

"It is the claim of the plaintiff that while there is no evidence of any express authority given by the defendant company to its president, Mr. Hayes, to sign this contract of employment, that the testimony in the case regarding Mr. Hayes' duties at the defendant company, shows that he had implied authority to sign the contract. * * * That the testimony in the case regarding Mr. Hayes' duties as president of the defendant company shows that he had implied authority to sign the contract, that is, that the scope and intent of his authority as president, from the nature of the duties he was given and allowed to perform, was such that this defendant company held Mr. Hayes out to the world at large and to Mr. Loew, the plaintiff, as being clothed with sufficient authority to make and sign the contract. If the defendant company held out Mr. Hayes, its president, as being clothed with sufficient authority to make and sign the

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contract, then the defendant company would be liable for his act in so doing.

"The plaintiff also claims that the contract in question at about the time it was made, was called to the attention of certain officers and directors of the defendant company aside from its president, who had knowledge of its terms while plaintiff was working for the defendant company.

"The defendant claims that Mr. Hayes, as president, had no authority to enter into any such contract and that it was never in any manner ratified by the defendant company.

"I charge you as a matter of law, that the management of the defendant company was vested in its board of directors by the by-laws and that the only powers of the president, Mr. Hayes, as disclosed by the by-laws were the general supervision of the affairs of the company subject to the board of directors. The directors have not expressly, by resolution, empowered Mr. Hayes to make this contract with the plaintiff or to make any contracts of employment generally; but the question arises, Has the defendant held out Mr. Hayes as having apparent authority to make this contract or has it ratified the act of Mr. Hayes?

"If you find that the defendant has not done these things, your verdict must be for the defendant.

"The defendant claims that Mr. Hayes has never been in the habit of making contracts with employees for a term of years without the approval of the directors, that this is the first instance of that kind. The defendant also claims that it never knew of the existence of a written contract until about the time that the plaintiff was discharged and so could not have ratified it. The defendant does not claim that it did not know the plaintiff was employed, but that it had a right to assume that his employment was no more than a monthly basis, which was the only basis of employment of all the important officials in existence at the time.

"The defendant also claims that the meeting between Mr. Loew, Mr. Hayes, Mr. Smith and Mr. Carrow was sufficient to at least notify the plaintiff that Mr. Hayes was not the sole person in authority and that Mr. Loew should have seen to it that the con-

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tract was approved by the directors. If these contentions are correct, I charge you that your verdict should be for the defendant.

"Unless you find by a preponderance of the evidence that either the president, Mr. Hayes, had implied authority to make the contract, or that the contract was ratified by the defendant company, then your deliberations will cease at that point and your verdict be for the defendant, no cause for action."

The case was tried with great care. We find no reversible error.

The judgment is affirmed, with costs to the appellee.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

STRUBLE *v.* COMMUNITY CLUB.

LANDLORD AND TENANT—LEASE—COVENANT AGAINST SUBLETTING—BREACH—NOTICE—ESTOPPEL.

Where the purchaser of a building leased to a voluntary association as an armory knew that it had been rented to various organizations for public meetings without objection from the lessor, he was in no position to claim that the covenant against subletting was thereby breached.

Error to Gratiot; Moinet (Edward J.), J. Submitted May 11, 1922. (Docket No. 78.) Decided June 5, 1922.

Summary proceedings by Elburtus L. Struble against the Community Club and another for the

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possession of leased premises. There was judgment for plaintiff, and defendants appealed to the circuit court. Judgment for defendants on a directed verdict. Plaintiff brings error. Affirmed.

George P. Stone and *Charles H. Goggin,* for appellant.

O. L. Smith and *O. G. Tuttle,* for appellees.

MOORE, J. This case was commenced before a circuit court commissioner to recover the possession of real estate held by the defendants. The case was appealed to the circuit court. From a directed verdict in favor of the defendants the case is brought into this court by writ of error.

Mary H. Church was the owner of the real estate involved in the controversy. April 12, 1918, she gave a power of attorney to James P. Gibbs to manage her real estate in Gratiot county. December 23, 1918, Mr. Gibbs executed a paper, the material parts of which read:

"It is hereby agreed between Mary H. Church of New York City, by Jas. P. Gibbs, her attorney in fact, party of the first part, and the Home Guards of Ithaca, Michigan, by the following duly authorized committee party of the second part, as follows: The said party of the first part, in consideration of the rents and covenants herein specified, do hereby let or lease to the said party of the second part the following described premises * * * for the term of 20 months from and after the first day of January, 1919, on the terms and conditions hereinafter mentioned, to be occupied for an armory and in no case to be used for any business deemed extra hazardous on account of fire. * * *

"And the said party of the second part does hereby hire the said premises for the term of 20 months as above mentioned, and does covenant and promise to pay to the said party of the first part, representatives and assigns for rent * * * with the privi-

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lege of renewing this lease for 40 months at the expiration of this lease on the payment of $20 per month for the additional time.

"And the second party will not assign or transfer this lease, or sublet said premises, or any part thereof without the written assent of said party of the first part. * * *

"The covenants, conditions and agreements, made and entered into by the several parties hereto, are declared binding on their respective heirs, representatives and assigns.

"ITHACA HOME GUARDS by Committee
"LELAND HELFER Seal.
"FLOYD E. BARNES Seal.
"ADNA H. BURGRAFF Seal.
"MARY H. CHURCH Seal.
By JAMES P. GIBBS
Her Attorney in fact.
"H. P. BERMAN."

July 12, 1920, the plaintiff bought by land contract the real estate in question with a provision in his contract reading: "This contract is made subject to a certain lease to the Home Guards."

August 31, 1920, the plaintiff caused a notice to be served on defendant, the material parts of which read:

"To Leland Helfer, The Community Club of Ithaca, Michigan, or any person claiming any rights in the premises hereinafter described under him or them.

"*Gentlemen:* Please to take notice that the lease of the Palace Hall situated on the west end of lots 4 and 6 upper Ithaca, Michigan, executed by Mary H. Church to the Home Guards of Ithaca, Michigan, on December 23, 1918, expires on this date, and I demand that you surrender to me as the owner of said premises full and entire possession of said premises at the expiration of this date."

The defendants did not vacate the premises and this proceeding was brought with the result before indicated. We cannot state the contention of the appellant better than to quote as follows from the brief:

"It is our contention that the important question

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in the case is whether under the facts as disclosed by the record the plaintiff was obligated to give a renewal of the lease to the Community Club. We also contend that the evidence shows such a subletting and for such purposes as constituted a misuse of the premises and worked a violation of the covenants of the lease. We also contend that conceding all the claims of the defendants regarding a waiver by acceptance of rent, to the full extent of their claims such waiver did not legally estop the plaintiff from refusing to renew the lease.

"If we are right in these contentions then we believe we are entitled to a reversal of this judgment and the judgment in this court in favor of the plaintiff.

"And in any event we claim that the questions of the identity of the Community Club with the Home Guards, the violation of the covenants of the lease, and the waiver of conditions and covenants by the lessor, were questions of facts which should have been submitted to the jury."

Upon the trial Mr. Helfer and Mr. Burgraff were called as witnesses by the plaintiff. Other witnesses were sworn in behalf of the plaintiff. No witnesses were called on the part of the defendants. In addition to the reason stated in the notice of August 31, 1920, from which we have quoted, for asking for the possession of the premises, it was claimed on the trial that defendants had breached the provision that "the second party will not assign or transfer this lease, or sublet said premises or any part thereof, without the written assent of said party of the first part."

The record is somewhat long but there is not much conflict as to what occurred. The Ithaca Home Guards was a voluntary organization and the lease was made through the action of a committee. Later the voluntary organization, known as the Ithaca Home Guards, was called the Ithaca Military & Recreation Club, and still later it was called the Community Club. Through all these changes the club remained a voluntary organization, with the

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same membership except as changes were made by some of the members dropping out and other members being received. The armory building, so called, in addition to being used for the members of the club was rented at from $4 to $10 a night to various organizations, like the Cattle Buyers' organization; the Gleaners; the Farmers' Institute; for dances; to the Knights Templar; to the Eastern Stars; to the Grange; for an automobile show; the plaintiff leased the building one evening; for various public meetings.

We quote some of the testimony of Mr. Gibbs who made the lease on behalf of Mrs. Church:

"I remember when the evangelistic services were held in the building. I heard they were being held there. I heard people talking about it. I was in Ithaca at that time. I didn't pass the building and see the people in there. I know evangelistic services were being held there. I didn't see the people going into the building or coming out. I didn't make any objection to it. I knew a meeting was being held there when Leonard Wood was there. I went along with the other fellows. It was a special meeting. There was a big crowd there. They didn't all get into the building. I guess they could not get in. I don't know when the meeting was held positively. It was the 27th day of March, I think. It was before the presidential primary. I was in the building at that time; a few days after that I went over to get my rent and I didn't object to that usage. It wouldn't have made any difference whether the check had been signed Community Club or Home Guards. Before I made that lease, I made no investigation as to who the members of the Home Guards were. I didn't know all the members. I supposed Leland Helfer was a member. I had seen him drill with the fellows. I supposed Floyd E. Barnes was. I knew that these boys were renting the building for the Home Guards and that they were getting it for that society. I didn't know that they were members of that voluntary association. I didn't make any inquiries as to whether they were members or not. It didn't make any differ-

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ence. It simply was to rent the building. I didn't know at that time that Harry P. Berman was a member or Adna Burgraff. I remembered another meeting that was held in the armory the latter part of April when Milo Campbell was there and there was a good crowd and I was in the room and they had a big community dinner there and I ate dinner there. The forepart of May following I collected the rent and at that time I didn't raise any question about the fact that this meeting was held. It didn't make any difference. I didn't know whether they had gotten any pay for it or not. It didn't make any difference to me and if I had known it I don't know as it would have made any difference to me if I had known that the money that I received consisted of this $6 received for rent of the building and the fact that the check was signed by the Community Club didn't make any difference. I remembered trying to sell this building to some of the business men in town. I remembered saying upon an occasion when I talked with you that the business men ought to purchase this for a Community Club.

"*Q.* They were trying to get along and put on those things for the benefit of the community?

"*Mr. Goggin:* I object to that as being incompetent, irrelevant and immaterial.

"*The Court:* He may answer.

"*A.* Yes, sir.

"*Witness:* This was before I made any sale to Mr. Struble and was when the Community Club was putting on these things."

The building during all the time was managed by Mr. Helfer acting for the clubs bearing the various names. He collected in the money received for the use of the building and paid the rent to Mr. Gibbs for Mrs. Church, except for a short time when in the absence of Mr. Gibbs it was paid to the son of Mr. Gibbs.

The rent was paid many times by the giving of checks. Some of them were signed "Ithaca Military & Recreation Club, Leland Helfer, Chrn. Bld. Com."

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Some of them "Home Guards a/c." "The Community Club, Leland Helfer."

The defendants were not willing to surrender the lease at the end of the 20 months, and tendered the rent. Was the use that was made of the armory an assignment or transfer of the lease, or a subletting within the meaning of the provision contained in the lease?

In 16 R. C. L. p. 870, it is said:

"A covenant against subletting is not violated by placing a caretaker in possession during the tenant's absence. It is clear that, even under a liberal construction of the covenant to constitute a violation of a lease the lessee must have attempted to put in possession of the premises a new tenant, not merely a new occupant. To be a tenant a person must have some estate, be it ever so little, such as that of a tenant at will or on sufferance. A subletting creates a new estate dependent upon or carved out of but distinct from the original leasehold. A person may be in occupation of real property simply as a servant or licensee of his master. In that case the possession is not changed; it is always in the master."

See, also, *Presby* v. *Benjamin*, 57 L. R. A. 317 (169 N. Y. 377, 62 N. E. 430); *Leduke* v. *Barnett*, 47 Mich. 158; *Sommers* v. *Reynolds*, 103 Mich. 307.

It is evident from the testimony that everybody cognizant of the facts regarded the use that was made of the armory to be a proper use to make of an armory. The plaintiff knew the use that was made of it. Mr. Gibbs knew the use that was made of it, and made no objections to such use. He received and cashed checks signed "Ithaca Military & Recreation Club, Leland Helfer, Chrn. Bld. Com." "Community Club, Leland Helfer, Secy. & Treas." See *Stoddard* v. *Gallagher*, 133 Mich. 374. The case of *Patterson* v. *Carrel*, 171 Mich. 296, has a collation of the authorities and is directly in point. See, also, *Pearson* v. *Sullivan*, 209 Mich. at pages 312 and 313

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(9 A. L. R. 438). If there was a technical breach of the agreement it has been waived.

As to the rights of members of a voluntary association, see 25 R. C. L. p. 57; *Sommers* v. *Reynolds*, 103 Mich. 307; *Schiller Commandery* v. *Jaennichen*, 116 Mich. 129; *Detroit Light Guard Band* v. *Independent Infantry*, 134 Mich. 598; *Walters* v. *Pittsburgh, etc., Iron Co.*, 201 Mich. 379. We think the trial judge properly directed a verdict.

The judgment is affirmed, with costs to the appellees.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

ROARK v. CITIZENS BANK OF SALINE.

1. VENDOR AND PURCHASER — LAND CONTRACT — ASSIGNMENT BY AGENT VOID.

   Where the agent of the owner of land executed a contract in his own name to sell same, which was left with a bank, together with a deed signed in blank by the owner, which was to be delivered to the purchaser on the payment to the bank of $350, an assignment of said contract by said agent to his wife conveyed nothing since he had nothing to convey, and the bank properly paid the money to the executor of the estate of the owner, who had died.

2. SAME—PARTIES—RIGHTS OF OWNER OF LAND NOT A PARTY TO SUIT NOT CUT OFF.

   Nor could a decree in a divorce suit between said agent and his wife, giving the latter a lien upon the money paid to the bank, cut off the rights of the owner of the land or his executor, they not being parties to the suit.

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Appeal from Washtenaw; Sample (George W.), J. Submitted April 18, 1922. (Docket No. 71.) Decided June 5, 1922. Rehearing denied July 20, 1922.

Bill by Eliza A. Roark against the Citizens Bank of Saline and others to require the payment to plaintiff of a certain sum paid into defendant bank. From a decree for defendants, plaintiff appeals. Affirmed.

A. F. Freeman, for plaintiff.

John P. Kirk, for defendants.

MOORE, J. This is a bill of complaint filed for the purpose of requiring the Citizens Bank of Saline, or Carl A. Curtiss, its cashier, to pay over to the plaintiff $350 paid to Mr. Curtiss by William Parros by reason of a contract made by Fred McKey with Mr. Parros, and the delivery to Mr. Parros of a deed made by E. W. Hunt. The plaintiff claimed to own the contract by reason of an assignment to her by Fred McKey. The contract between Mr. McKey and Mr. Parros was for the sale of real estate that was not owned by Mr. McKey, but the legal title was in Edmund W. Hunt, who married the mother of Fred McKey. The contract was left with the bank and it also held a deed from Mr. Hunt with the name of the grantee left in blank, and it was the understanding that when Mr. Parros paid the $350 mentioned in the contract, the deed left with the bank by Mr. Hunt should be delivered to Mr. Parros, and it was delivered to him when he paid the money.

It is the claim of the defendants, Citizens Bank of Saline, Carl A. Curtiss and William Parros, that the property which was conveyed to Mr. Parros by reason of the execution of the deed on September 1, 1920, by Mr. Hunt, was the absolute property of Mr. Hunt, and that any money realized from the sale of said property to Mr. Parros now belongs to the estate of Edmund

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W. Hunt, he having died December 17, 1920, and that Carl A. Curtiss, as executor of his last will and testament, is entitled to the possession of the same. The chancellor who heard the case in open court made a decree in accordance with the claim of the defendants. The case is brought here by appeal.

The facts are not very much in dispute, and show that plaintiff was greatly defrauded by the defendant McKey. We will not go greatly into detail. Mrs. Hunt was sick for a considerable time before her death. Mr. McKey helped take care of her through her last illness. After her death Mr. Hunt went to the Soldiers' Home, where he later died. He left a will giving his property to his wife in case she survived him. In case of her death before Mr. Hunt died the property was to go to Fred McKey. Mrs. Hunt died before her husband did. He left about $150 in pension money and his interest in the property described in his deed to Mr. Parros. The expenses of his last illness and death were in excess of $300. The plaintiff loaned to Edmund W. Hunt in his lifetime $1,750, which was secured by a mortgage on Mr. Hunt's real estate, and which is the same real estate that was later deeded to Mr. Parros. Mr. McKey knew about this loan and evidently conceived the idea that the plaintiff possessed some property which he desired to possess. He proposed marriage to her. Before they were married he borrowed some money of her. The day they were married he borrowed more money of her, and that night he registered them at the hotel under an assumed name. He stated to her he had $350 coming to him at the defendant bank. Later he assigned to her the contract in question. Still later he obtained from her $750, claiming he had bought a business on which he had paid $250, which amount he was likely to lose unless he could make payment of the balance due. Mrs. McKey soon became convinced she had married

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an unscrupulous man, and caused his arrest. He was convicted of "larceny by trick" in obtaining from her $750. Mrs. McKey also instituted divorce proceedings which resulted in a decree of divorce in her favor. It was also provided in the decree that she might resume her former name. In the divorce decree reference was made to the land contract with the following provisions:

"The said plaintiff may have and take under said land contract such remedy, action or proceeding for the recovery thereof or for the recovery of the premises embraced by the land contract as exist in law in such cases made and provided in behalf of a vendor or owner of lands in like cases where premises or real estate are conveyed ordinarily by the provisions of land contracts in this State. * * *

"It is further ordered, adjudged and decreed that in the event it shall ever be held or decided by any court having competent jurisdiction of the subject-matter and the parties properly involved that the said land contract was not turned over, assigned or transferred by said defendant to said plaintiff as herebefore stated or assumed to be, then, if the alimony both temporary and permanent and the whole thereof amounting at this time to ten hundred and five dollars as aforesaid, shall not have been paid by said defendant to said plaintiff as hereinbefore required to be paid, said plaintiff shall, by the decree of this court, have first lien on all the rights, interest and title of said defendant in and to said land contract and, to make such lien effectual to the intent and purpose that this plaintiff shall have all sums of money due and payable thereby, the further decree of this court is that said land contract is by operation of this decree, assigned, transferred and set over as of November 5, 1920, together with all rights, interest and titles as therein stated in behalf of said defendant, to this plaintiff to satisfy in part and for the amount paid, the said alimony, temporary and permanent."

In the case before us counsel claim that plaintiff purchased the land contract for value before due and without notice of alleged latent equities, and should

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therefore be entitled to the $350 paid to the bank by Mr. Parros, citing 5 C. J. p. 974, paragraph 165, and other authorities.

There is no difficulty with reference to what the law is, but the question is how it is applicable to the instant case. It is true Mr. McKey signed a contract but he never had it in his control. After it was signed it was left in the bank. Mr. McKey never had any interest in the real estate described in the contract. The important part of the transaction was that Mr. Parros was to get title to the real estate by the payment to the bank of the amount of money mentioned in the contract, and he could only do this by means of a deed from Mr. Hunt, which was left with the bank. The transaction was not for the benefit of Mr. McKey but was for the benefit of Mr. Hunt. If the plaintiff had taken the precaution to inquire of the bank she would doubtless have learned the true situation. She did not do this but relied upon the statements made to her by her husband who lied to her.

Counsel for appellant further contend that plaintiff was given a lien upon the $350 in the divorce decree. This contention is our justification for quoting so much of that decree. It is true that the decree deals with the respective rights of Mrs. McKey and her husband to the land contract. Neither Mr. Hunt nor any one representing him was a party to that litigation, none of the defendants in the instant case except Mr. McKey was made a party to the divorce proceeding and of course their rights could not be cut off in that proceeding.

We think the chancellor reached the right conclusion, and his decree is affirmed with costs to the appellees.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

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GRANGER *v.* DURYEA.

1. WILLS—CONSTRUCTION—INTENT.
   In the construction of a will the intent of the testator should be gathered if possible from the entire instrument.
2. SAME—DISTRIBUTION—PER CAPITA.
   Where a will provided that, after the death of certain of testatrix's children and the execution of a special trust to a son, all of the remainder of her estate should be divided "between those of my grandchildren as shall then be living, and the issue of each of the grandchildren as shall then have died and left issue them surviving," the final distribution of the estate should be made *per capita* among the grandchildren surviving at the time designated.

Appeal from Wayne; Richter (Theodore J.), J. Submitted April 20, 1922. (Docket No. 82.) Decided June 5, 1922.

Bill by Harriet W. Granger, executrix of the last will of Stanley R. Granger, deceased, and others against John L. Duryea and others for a construction of the last will of Mary J. Granger, deceased. From a decree for defendants, plaintiffs appeal. Affirmed.

James Swan and *Edward G. Wasey,* for plaintiffs.

Rood & Visscher, William R. Grover, George W. Barrus, and *James H. McDonald,* for defendants.

MOORE, J. The bill of complaint was filed in this case on November 10, 1920, for the purpose of obtaining the construction of a will left by Mary J. Granger, deceased. Mrs. Granger died May 30, 1892. Her will was duly probated. One witness was sworn who testified in substance as follows:

"Mary J. Granger was my grandmother. She died

On gift to persons not designated by name but by general description, and as being living at a certain time prior to testator's decease, as a gift to individuals or to a class, see note in 34 L. R. A. (N. S.) 945.

On the question as to whether division is *per stirpes* or *per capita* under a gift to issue, see notes in 2 A. L. R. 963; 5 A. L. R. 195.

On the question of taking *per stirpes* or *per capita* under will, see note in 16 A. L. R. 15.

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on the 30th day of May, 1892, leaving certain property in the city of Detroit, the assessed valuation of which was $29,150. At the time of her death she left the following heirs: Sarah J. Granger, a daughter, 44 years of age at the time of her mother's death, who died March 9, 1920; Joseph W. Granger, a son 41 years of age at the time of his mother's death, who died October 9, 1897; John H. Granger, a son, at the time of his mother's death 54 years of age, who died May 8, 1896; Emily Lawson Knight and Joseph G. Lawson, children of her deceased daughter, Nancy Lawson Hunt, who died January 1, 1884; Joseph N. Duryea, John L. Duryea, Nellie Duryea, Ida Duryea Tobin and Sarah Warren, all children of her daughter Mary P. Duryea, who died April 17, 1890. Ida Duryea Tobin died after her grandmother about the year 1915, married, leaving a husband and no issue.

"*Q.* Do you know whether or not your grandmother had any reason to favor any of her grandchildren more than another?

"*A.* I know of no such reason."

Certain documentary proof was introduced in evidence.

A decree was entered dividing the property *per capita* among the grandchildren. The case is brought here by appeal.

It is agreed that the only question is whether the distribution of the property should be *per capita* or *per stirpes*. The appellants claim it should be *per stirpes*.

The provisions of the will calling for consideration read:

"*Third:* Out of the cash or securities which I shall have in bank or elsewhere, I direct my executors to pay over to Andrew McLellan, banker of Detroit, Michigan, and to said Sarah J. Granger the sum of two thousand dollars, to be held by them in trust for the uses of my son John to wit:

"(1) To care for him in case of severe illness, when he may in their opinion need more than the monthly allowance herein provided to be paid to him; (2) to defray the expense of transportation of his remains to Detroit, if he should die away from here, and his

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funeral expenses generally and (3) to pay for a headstone to his grave and (4) to pay the residue if any, at his death into my general estate. I further direct my said trustees that they may pay the income from said fund to him annually, or to allow it to accumulate as they may from time to time think best. * * *

"*Fifth:* All the rest and residue of my estate including the reversion of the real estate on Adams Ave. W., hereinbefore given to my daughter for life, I give, will and devise to the said Andrew McLellan and Sarah J. Granger in trust only for the uses and purposes herein named, to-wit: * * * (2) Out of the net income of my said estate to pay to my eldest son, John H. Granger, the sum of forty dollars per month on the last day of each and every month for his support so long as he shall live.

"(3) The remainder of the income from said estate I direct to be divided into four equal parts and one fourth thereof paid to Joseph W. Granger or his issue, one fourth to Sarah J. Granger or her issue, one fourth to the children of my daughter Nancy E. Lawson Hunt, and their issue, and one fourth to the children of my daughter Mary P. Duryea, and their issue, the payments to my children being made quarter yearly and those to my grandchildren or their issue at such times, and in such amounts and manner as shall seem to my trustees best calculated to induce, aid and enforce in them respectfully habits of industry, economy and thrift.

"(4) After the death of my children, Joseph W. Granger and Sarah J. Granger to divide all of my estate, except the special trust for John of $2,000 and the fund hereinafter named for him, if he then be living and the cemetery lot fund, or the proceeds from the sale of the same as my trustees may think best for my legatees hereunder, between those of my grandchildren as shall then be living and the issue of such of the grandchildren as shall then have died and left issue them surviving. But if my son John H. shall survive my other children, a sufficient portion of said estate shall be held by my trustees for the purpose of producing a clear regular income as provided for in paragraph two of this article."

It is a cardinal rule in the construction of wills that

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the intent of the testator should be gathered if possible from the entire instrument. *Tewksbury* v. *French,* 44 Mich. 100; *Cummings* v. *Corey,* 58 Mich. 494; *Wales* v. *Templeton,* 83 Mich. 177; *Thurber* v. *Battey,* 105 Mich. 718; *Gregory* v. *Tompkins,* 132 Mich. 205; *In re Ives' Estate,* 182 Mich. 699; *In re Blodgett's Estate,* 197 Mich. 455.

The appellants urge if this rule is followed that the distribution should be *per stirpes* and they lay great stress upon the provision relating to the distribution of the income of the estate.

The court below decreed that it was the intention of said testatrix to divide the principal of her estate equally, share and share alike, among the grandchildren surviving at the death of the said Sarah J. Granger. If the decree of the lower court is sustained, each of the grandchildren will take an undivided one-eighth of said estate. If the contention of the appellants is sustained, and the grandchildren should take *per stirpes,* Emily Lawson Knight, Joseph G. Lawson, Frank Granger and Stanley R. Granger would each take one-sixth of said estate, and the four Duryea heirs, viz., John L. Duryea, Nellie Duryea Barry, Sarah Duryea Warren, Joseph H. Duryea or his assignee, would each take one-twelfth of said estate. There is nothing in the record to indicate that Mrs. Granger held some of her grandchildren in higher esteem than she did the others, or that she desired to provide more liberally for them.

The language of the will is that, after the death of Mrs. Granger's children, Joseph W. and Sarah J., and the execution of the special trust to her son, John H., all of the remainder of her estate shall be divided "between those of my grandchildren as shall then be living, and the issue of each of the grandchildren as shall then have died and left issue them surviving."

This language is not ambiguous and clearly in-

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dicates that Mrs. Granger desired the final distribution of her estate to be made *per capita*. We think the instant case is quite readily distinguishable from *Eyer* v. *Beck*, 70 Mich. 179, cited by counsel for appellants, as appears by the following language of Justice CAMPBELL:

"But it seems to us also that the will is not ambiguous in its language, and is only made so by importing into it a forced and unnatural doctrine which the testator probably never heard of. The laws of inheritance are generally understood by intelligent people. It is understood that when there are children and grandchildren to take, the grandchildren by one child take in the aggregate only that child's portion. In our judgment this idea is clearly expressed in the will. The testator directs that the property shall be equally divided among his 'heirs.' He then goes on to name them, and in so doing gives the name of each child, but not of any grandchild. Those he describes only as 'the children of Christian Beck, Jr., deceased.' Coming as this does in the description of the heirs, we think it evidently means that those children together represent one heir. That is in harmony with the statute of distributions, and is at least quite as natural a meaning as the other, and is to be preferred for that reason, as conforming to our general policy.

"As already suggested, any language which distinctly indicated a preference for the three grandchildren over other grandchildren should have due weight. But there is no such language. In spite of the leaning of some of the outside decisions to the contrary, we think there is significance in grouping without naming them."

The instant case is more like *Wells* v. *Hutton*, 77 Mich. 129; *Van Gallow* v. *Brandt*, 168 Mich. 642; *Colby* v. *Wortley*, 205 Mich. 609.

We think the chancellor reached a right conclusion. The decree is affirmed, with costs to the appellees.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

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SYMONS *v.* GREENWOOD, ATKINSON, ARMSTRONG CO.

SALES—ACCEPTANCE—CONTRACTS—WAIVER.

Although overcoats delivered to defendant were not the kind ordered, and were not delivered within the specified time, defendant is liable, in an action for the purchase price, where, without consent of the seller, he altered some of them and attempted to sell them, since he thereby waived strict performance of the contract.

Error to Wayne; Dingeman (Harry J.), J. Submitted April 7, 1922. (Docket No. 40.) Decided June 5, 1922.

Assumpsit by Samuel Symons against the Greenwood, Atkinson, Armstrong Company for goods sold and delivered. Judgment for plaintiff on a directed verdict. Defendant brings error. Affirmed.

J. Shurly Kennary, for appellant.

Finkelston & Lovejoy and *H. C. Chilson*, for appellee.

MOORE, J. Each of the parties to this litigation asked for a directed verdict. The trial judge charged the jury as follows:

"Gentlemen of the jury: By wire and letter the defendant ordered of the plaintiff 110 42-inch length United States regulation overcoats for delivery in Detroit not later than Tuesday, November 26, 1918. This order was accepted by plaintiff. The coats were for use in a Thanksgiving day parade. The plaintiff did not deliver the overcoats in Detroit until subsequent to Thanksgiving day, delivery being made in two lots, one of two trunks and one of three trunks.

"On November 29th that being the day following Thanksgiving day, and at a time when the two trunks

On waiver of right to rescind for breach of warranty or noncompliance with contract, see note in 36 L. R. A. (N. S.) 468.

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had been delivered to the defendant, the defendant wrote the plaintiff among other things as follows:

"'We have opened the first two cases and we find that they are not as ordered—not one of them 42 inches as we designated in our order; 12 of them were half lined and colors impossible to use. In fact, they look like a very poor lot of merchandise. Awful sorry this happened and we think you did the best you knew how, but the fact remains that they are not what we ordered—they are all mixed colors of all kinds. Kindly advise us what disposition to make of them and oblige.'

"The complete shipment was received on Saturday, November 30th. On that day defendant wrote plaintiff:

"'We have just received the three trunks this morning. I do not know what we will do with our customers, they are very sore. We are returning to you today 17 coats that are absolutely no use to us. We think we may be able to get rid of these coats Monday, if not all of them, as many as we can. It is unfortunate—we know you did all you could, but that does not help in the least under the conditions. Rather afraid they got track of some other coats, but we will do the best we can and see if we cannot get rid of them between now and Monday. Every one of the coats will have to be shortened if I get rid of them which I think is possible. They are all 47 and 48 inches long. I would not have returned the 17, but would not care to offer them to our customer under any circumstances.'

"On December 4th the defendant wrote plaintiff as follows:

"'We have yours of the 2nd inst. and regret exceedingly the conditions, and do not think that we do not appreciate your efforts, but the fact still remains that we ordered 110 coats, to be 42 inches long, delivery to be made so we could deliver them for the Thanksgiving parade, and unfortunately they did not arrive. We returned 17 of the coats for the simple reason that we could not use them at any rate, they are not what we want, in fact, all of the coats will have to be shortened and it looks now as though we will be able to sell them. If it had been anybody but yourself that we purchased these coats from we would have returned them all as they do not fill the bill as to length, etc. We appreciate your efforts and will shorten them as they will not accept them unless they are shortened—they all want 42-inch coats. I know of no arrangement made with you

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that we were to keep these coats, that they were not to be returned. You wrote us to that effect, but we had no opportunity to answer simply because you left New York with the garments. It is all right, we will retain the 102 coats, and thank you very much for your trouble.'

"On December 5th the defendant wrote plaintiff as follows:

"'Since writing you yesterday, when we felt we had a reasonable assurance that we might possibly get rid of the coats, we shortened 3 of them, but the whole effect of the coat is spoiled—it has no appearance of a short coat whatsoever, and our customer absolutely refuses to accept them. There is nothing we can do, unfortunately, but to send them back. Wire us as to disposition.'

"A few of the coats were shortened and some effort was made to sell them. Plaintiff refused to accept the return of the 17 coats when tendered to him. This action is now brought to recover the purchase price of the coats and a motion has been made on behalf of both plaintiff and defendant for a directed verdict, it being agreed that the questions presented are ones of law rather than of fact. It must be taken as an established fact that the plaintiff in this case did not perform his contract either with respect to the kind of goods ordered or as to the time of delivery and if he is entitled to a verdict here, it must be based upon some act of the defendant which amounted to a waiver of strict performance of the contract. There can be no question but that the buyer may waive the provisions of the contract as to quality, kind or quantity; he may accept and become bound to pay for goods he never ordered; he may accept more or less than the stipulated quantity; he may accept goods of a different kind than those agreed upon; he may accept at a time or place other than that specified, and he may signify this acceptance not only expressly but impliedly and his implied acceptance may be found to be given, where, without dissent within a reasonable time he receives and retains goods delivered not in conformity to the contract or where he subsequently deals with them as owner.

"Defendant shortened some of the goods in question without the plaintiff's consent, and expressly stated in the letter of December 4th that they would retain 102

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of the coats. It seems to me that under the circumstances the defendants must be held to have waived the strict performance of the contract in question, insofar as the 102 coats are concerned. I therefore direct you to find a verdict for the plaintiff for the sum of $2,244, less 5% allowance conceded by plaintiff with interest at 5 per cent. from December 4th or total of $2,297.60. You may rise in your seats and the clerk will take the verdict."

Judgment for plaintiff for $2,297.60 was entered August 25, 1921. The defendant brings the case here by writ of error. The plaintiff contends the judgment is too small but has not brought error.

The defendant contends that he rejected the goods received as not being in compliance with the contract; that he thereafter made an offer to the plaintiff to retain part of the goods; that because this offer was not accepted, in fact rejected, the defendant is not liable to the plaintiff for any part of the goods. The defendant's chief reliance is upon *Jones* v. *Bloomgarden*, 143 Mich. 326.

The trouble with the contention of the appellant is that it is not borne out by the record. Not only did the defendant write plaintiff December 4th, "It is all right, we will retain the 102 coats and thank you very much for your trouble," but proceeded to shorten some of the coats and also put them all in stock and offered them for sale, and would have sold them if it could have found a customer, according to the testimony of the president of the defendant company, who was called as an adverse witness by the plaintiff.

The trial judge was justified in directing a verdict. See Mechem on Sales (1901 Ed.), § 1374; *Farrington* v. *Smith*, 77 Mich. 550; *Rubin* v. *Crowley, Milner & Co.*, 214 Mich. 365.

Judgment is affirmed, with costs to the appellee.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

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PARMALEE v. MORRIS.

COVENANTS—DEEDS—RESTRICTION AGAINST COLORED PEOPLE—VALIDITY—CONSTITUTIONAL LAW.

A restriction applicable to all the lots in a subdivision that "Said lot shall not be occupied by a colored person," *held*, not void as contravening the provisions of the 13th and 14th Amendments to the Constitution of the United States, or as contrary to public policy.

Appeal from Oakland; Gillespie (Glenn C.), J. Submitted April 6, 1922. (Docket No. 29.) Decided June 5, 1922. Rehearing denied November 2, 1922.

Bill by A. B. Parmalee and others against Charles Morris to enjoin the violation of certain real estate restrictions. From a decree for plaintiffs, defendant appeals. Affirmed.

Doty & Cram, for plaintiffs.

W. Hayes McKinney (*Barnes & Stowers*, of counsel), for defendant.

MOORE, J. The chancellor who heard this case filed a written opinion therein which so clearly states the questions involved that we reproduce it here:

"At the time the Ferry Farm Addition to the city of Pontiac was platted the lots were sold subject to the following uniform restrictions:

"'No building shall be built within twenty feet of the front line of the lot. Said lot shall not be occupied by a colored person, nor for the purpose of doing a liquor business thereon.'

"Defendant Morris and Anna Morris, his wife, both colored, have entered into a contract to purchase a lot

On validity and enforceability of contract or covenant in relation to real property which discriminates against persons because of race, color or religion, see note in L. R. A. 1916B, 1208.

On provision in deed discriminating against persons on account of race, color, or religion, see note in 9 A. L. R. 120.

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in the subdivision, and the bill of complaint was filed by plaintiffs, who are owners of lots on the same subdivision and residents of the neighborhood, to restrain defendants from violating the restriction by occupying the premises in question. The record presents the sole question as to whether or not the restriction against the occupancy of the premises by a colored person is void as contravening the provisions of the 13th and 14th Amendments to the Constitution of the United States, while plaintiffs insist that the provisions of the Federal Constitution have no application and that the restriction is a matter of a purely personal action of the owner of the premises and is valid and enforceable.

"Every owner of land in fee is invested with full right, power and authority, when he conveys a portion away, to impose such restrictions and limitations on its use as will in his judgment prevent the grantee, or those claiming under him, from making such use of the premises conveyed as will impair the use or diminish the value of the part which he retains. The only limitation on this right is the requirements that the restrictions be reasonable; not contrary to public policy and not create an unlawful restraint on alienation. These rights have been repeatedly recognized by our Supreme Court, and in a recent case the following quotation from 7 R. C. L. p. 1114 is cited with approval:

"'A person owning a body of land, and selling a portion thereof, may, for the benefit of his remaining land, impose upon the land granted any restrictions not against public policy, that he sees fit, and a court of equity will generally enforce them.' *Davison* v. *Taylor*, 196 Mich. 605, 611.

"The reasons urged on behalf of defendants, why these general rules are not decisive of the issue, are:

"(1) Because the restriction contravenes rights granted to defendants by the 13th and 14th Amendments to the Constitution of the United States.

"(2) Because the restriction is contrary to public policy.

"These reasons will be discussed in their order.

"1. Since the days of the civil rights cases the law has been regarded as settled that the provisions of the 13th and 14th Amendments applied to legislative acts

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of the State rather than the actions of individuals. In the *Civil Rights Cases*, 109 U. S. 3 (3 Sup. Ct. 18), the United States Supreme Court, in passing upon the scope of these amendments, said:

"'It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope.'

"And again in *United States* v. *Cruikshank*, 92 U. S. 542, it is said:

"'The inhibition of the 14th Amendment applies exclusively to actions by the State, and has no reference to actions by individuals.'

"In an exhaustive opinion in *Plessy* v. *Ferguson*, 163 U. S. 537 (16 Sup. Ct. 1138), the court said:

"'The object of the Amendment (14th) was undoubtedly to enforce the absolute equality of the two races before the law, but in the nature of things it could not have been intended to abolish the distinctions based upon color, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either. Laws permitting, and even requiring, their separation in places where they are liable to be brought into contact do not necessarily imply the inferiority of either race to the other, and have been generally, if not universally, recognized as within the competency of the State legislatures in the exercise of their police power.'

"It is interesting to note that in the foregoing case the Supreme Court of the United States sustained the validity of a statute of Louisiana providing for the separation of races in passenger cars as not being repugnant to the provisions of the 14th Amendment.

"It would seem settled by the foregoing decisions of the highest court of our land that the provisions of the 13th and 14th Amendments cannot be invoked in the present case. The issue presented arises out of individual rather than State action and is to be determined wholly as a domestic issue. The case of *Gandolfo* v. *Hartman*, 49 Fed. 181 (16 L. R. A. 277), cited by defendants, has but little bearing on the issues presented. In that case a covenant not to rent property to a Chinaman was held to be void and unenforceable. The effect of the 14th Amendment was

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discussed by the court, but the case appears also to have turned upon the provisions of the treaty with China which guaranteed its citizens the equal protection of our laws.

"2. Is the restriction contrary to public policy?

"It has been said that certain acts are contrary to public policy so that the law will refuse to recognize them when they have a mischievous tendency so as to be injurious to the interests of the State. This brings up the question as to what interests of the State are likely to be injured if an owner of property, for reasons which are satisfactory to himself, refuses to sell himself, or permit his assignors to sell to certain persons who may be distasteful to him as neighbors. Are there any interests of the State which will be promoted or advanced compelling the creation of such a condition in the community? The law is powerless to eradicate racial instincts or to abolish distinctions which some citizens do draw on account of racial differences in relation to their matter of purely private concern. For the law to attempt to abolish these distinctions in the private dealings between individuals would only serve to accentuate the difficulties which the situation presents.

"The precise issues presented have been squarely before the courts of last resort of several States, and have been decided adversely to the contentions of defendants.

"In *Los Angeles Investment Co.* v. *Gary*, 181 Cal. 680 (186 Pac. 596, 9 A. L. R. 115), the court distinguished between a restriction against the sale and one against the occupancy of certain property by persons other than of the Caucasian race. The former was held invalid, as an unlawful restraint on alienation, while the latter was upheld.

"In *Koehler* v. *Rowland*, 275 Mo. 573 (205 S. W. 217, 9 A. L. R. 107), the supreme court of Missouri held that a condition in a deed against the transfer, lease or renting of the property in question to negroes was one which the vendor had a right to make and was not void on the ground of public policy. The same court in *Keltner* v. *Harris* (Mo.), 196 S. W. 1, also held that where an owner of real estate made a contract of sale of the same to a white man, and after making the deed discovered that it was made to a

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colored man for whom the white man was merely an agent, that the conveyance would be voided on the ground of fraud, saying:

"'If it was distasteful to plaintiff to have a colored man as his adjoining neighbor he had a legal right to refuse to sell to him or his agents the property in question. In other words, no man is bound to sell his property to a proposed purchaser whose presence is unsatisfactory to him as a neighbor, whether he be white, black or of some other color.'

"The same question was also before the supreme court of Louisiana in *Queensborough Land Co.* v. *Cazeaux*, 136 La. 724 (67 South. 641, L. R. A. 1916B, 1201, Ann. Cas. 1916D, 1248), where it was held that a condition in a deed that the grantee should not sell to a negro did not violate the provisions of the 14th Amendment and was not against public policy.

"One of the purposes of the restriction in the instant case was apparently to preserve the subdivision as a district unoccupied by negroes. Whether this action on the part of the owner was taken to make the neighborhood more desirable in his estimation or to promote the better welfare of himself and his grantees is a consideration which I do not believe enters into a decision of the case. So far as I am able to discover there is no policy of the State which this action contravenes. Were defendants' claim of rights based upon any action taken by the authority of the State an entirely different question would be presented.

"Defendant's motion to dismiss the bill of complaint will therefore be denied. The injunction heretofore issued is however broader than warranted by the provisions of the restriction. The restriction covers the occupancy of the property by a colored person only. In terms at least it would not be violated by leasing the same to a colored person so long as such person did not occupy it. The temporary injunction heretofore issued will therefore be modified to the extent of prohibiting defendant from occupying the premises himself, or from permitting the same to be occupied by a colored person, and as so modified, will be made permanent.

"GLENN C. GILLESPIE,
"Circuit Judge."

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A decree was made in accordance with the opinion. The case is brought here for review by appeal.

Counsel urge the same defenses that were urged in the court below. The following cases are cited by counsel for the appellant: *Title Guarantee & Trust Co.* v. *Garrott,* 42 Cal. App. 152 (183 Pac. 470); *Buchanan* v. *Warley,* 245 U. S. 74 (38 Sup. Ct. 16); *Ferguson* v. *Gies,* 82 Mich. 358 (9 L. R. A. 589, 21 Am. St. Rep. 576); *Gandolfo* v. *Hartman,* 49 Fed. 181 (16 L. R. A. 277); *Windemere-Grand, etc., Protective Ass'n* v. *American State Bank,* 205 Mich. 539; 18 C. J. pages 397-399, and other authorities. Some of these authorities do not sustain the contention of counsel.

We quote 18 C. J. p. 397, as follows:

"While restrictions against the use of property held in fee are not favored, yet where the intention of the parties is clearly manifested in the creation of the restrictions, they will be enforced in equity. Any use in contravention of the terms and objects of such covenants will constitute a breach for which relief may be obtained. Covenants restraining the use of real property afford an instance of that class of cases in which equity will charge the conscience of a grantee of land with an agreement relating to the land, although the agreement neither creates an easement nor runs with the land. The jurisdiction is not confined to cases in which an action at law can be maintained, but such covenants, although not binding at law, may be enforced in equity provided the grantee has taken with notice of the covenants." Citing many cases in the notes.

In *Windemere-Grand, etc., Protective Ass'n* v. *American State Bank, supra,* it was held the restrictions would not be enforced in equity where the character of the locality had changed.

In *Ferguson* v. *Gies, supra,* this court gave effect to the plain provision of a statute. A reference to the

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other cases will show them easily distinguishable from the instant case.

Counsel say in the brief:

"Under the theory of our American democracy and citizenship, negroes, or any other race or class, ought not now to be forced to stand and plead for right, justice and equity which ought to be the common heritage of all men by virtue of their citizenship and domicile within the jurisdiction of the United States. If the opinion of the learned trial judge is affirmed it will open a wedge to all kinds of discrimination, wrongs and injustice to a vast number of American citizens of African descent. Slavery was once defended by church and statesmen, but who today would want to be classified as an upholder of such a vile institution?

"Such a restriction as the one referred to, if upheld, would place the negro and people of other sects and creeds in the same category as slaughter houses, livery stables, tanneries, garages, etc., and brand them as a nuisance, loathsome and undesirable in neighborhoods. * * *

"Would the learned trial judge's decision stand the test of time? Will there always exist in this country conditions whereby judicial decision will band ten millions of people, as it affects the negro, three millions as it affects the Jew, and about thirty millions, as it affects the foreigner, and equally as many as it affects the Catholic, thus placing all of these classes in the list of undesirables? * * *

"We think the learned trial judge's decision in this case, if affirmed, would in a short period of time take the course of the *Dred Scott* decision written by Mr. Justice Taney."

We think the counsel has entirely misapprehended the issue involved. Suppose the situation was reversed, and some negro who had a tract of land platted it and stated in the recorded plat that no lot should be occupied by a Caucasian, and that the deeds that were afterwards executed contained a like restriction, would any one think that dire results to the white race would follow an enforcement of the restric-

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tions? In the instant case the plat of land containing the restriction was of record. It was also a part of defendant's deed. He knew or should have known all about it. He did not have to buy the land and he should not have bought it unless willing to observe the restrictions it contained.

The issue involved in the instant case is a simple one, *i. e.*, shall the law applicable to restrictions as to occupancy contained in deeds to real estate be enforced or shall one be absolved from the provisions of the law simply because he is a negro? The question involved is purely a legal one and we think it was rightly solved by the chancellor under the decisions found in his opinion.

The decree is affirmed, with costs to the appellees.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, SHARPE, and STEERE, JJ., concurred.

PEOPLE *v.* GENGELS.

1. WITNESSES—IMPEACHMENT MAY NOT BE BASED ON ANSWERS ON CROSS-EXAMINATION UPON COLLATERAL MATTERS.

   A witness may not be impeached on his answers to questions on cross-examination upon collateral matters.

2. CRIMINAL LAW—EVIDENCE OF OTHER CRIMES—WHEN ADMISSIBLE—GUILTY KNOWLEDGE—CRIMINAL INTENT.

   As a general rule, upon a trial for felony the prosecution may not introduce evidence tending to prove that the

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On evidence of other crimes in prosecution for rape, see notes in 62 L. R. A. 314, 322, 329; 48 L. R. A. (N. S.) 236.

On effect of defendant's mistake as to age of girl, under statute denouncing sexual offenses against female under specified age, see note in 25 L. R. A. (N. S.) 661.

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accused has been guilty of other distinct and independent crimes for the purpose of proving that he committed the offense charged, but an exception is recognized in that class of crimes where guilt depends upon the intent, guilty knowledge, and purpose with which the act charged is done, when evidence as to some overt act with intent to commit some felony not actually accomplished or a series of connected frauds, forgeries, passing counterfeit money, etc., is competent to establish guilty knowledge and criminal intent.

3. RAPE—STATUTORY RAPE—INTENT.
In a prosecution for statutory rape, proof of the intent goes with proof of the act of sexual intercourse with a girl under the age of consent.

4. SAME—CONSENT NO DEFENSE.
Proof of consent is no defense, where the girl is under the statutory age, since she is legally incapable of consenting.

5. SAME—BELIEF AS TO AGE OF CONSENT NO DEFENSE.
Nor is it any defense that the accused believed from the statement of the girl or others that she had reached the age of consent.

6. SAME—PROOF OF OTHER ACTS BETWEEN SAME PARTIES ADMISSIBLE.
In a prosecution for statutory rape, proof of other acts of intercourse between the prosecutrix and accused is permissible only for the purpose of showing opportunity, disposition of the parties, and intimate relations tending to break down self-respect and modesty.

7. SAME—EVIDENCE AS TO OTHER OFFENSE WITH ANOTHER PARTY INADMISSIBLE—IMPEACHMENT.
It was error for the prosecutor to assert, and attempt to prove, another rape by accused upon another girl at a different time, having no connection with the crime charged, claiming that it was admissible by way of impeachment.

Error to Kent; Perkins (Willis B.), J. Submitted April 14, 1922. (Docket No. 119.) Decided June 5, 1922.

Adolph Gengels was convicted of statutory rape, and

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sentenced to imprisonment for not less than 2 nor more than 5 years in the house of correction at Ionia. Reversed.

John M. Dunham, for appellant.

Cornelius Hoffius, Prosecuting Attorney (*Fred P. Geib*, of counsel), for the people.

STEERE, J. Defendant was tried and convicted in the circuit court of Kent county of the crime of statutory rape under an information containing one count which charged him in proper form with having, on May 24, 1921, assaulted Mildred Sayles, a female child under 16 years of age and "then and there feloniously did unlawfully and carnally know and abuse, contrary to the form of the statute in such case made and provided," etc. It was shown by her own and her father's testimony that at the time of the offense as charged Mildred Sayles was under 16 years of age and attending public school. She was a large girl, weighing about 135 pounds, who had been employed at different times as an usher at the Empress and other theaters in the city of Grand Rapids, where she had given her age as 16 years for the purpose of securing employment.

Defendant was a Lithuanian 24 years of age and employed as a cabinet maker in Grand Rapids. He had bought a second-hand automobile with which he admitted taking the girl riding at various times, having formed her acquaintance on the street, denied having sexual intercourse with her on the occasion charged or at any other time, and claimed that he cared for her a great deal, treated her as his sweetheart, and "acted like a gentleman."

There were no other witnesses to what occurred between them on the night in question. She testified positively to his having sexual intercourse with her.

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He positively denied it. Much of the record is composed of his lengthy cross-examination and many of defendant's 26 assignments of error are directed to that portion of the trial, particularly to claimed prejudicial conduct and comment of the prosecuting attorney in that connection, and attempts to collaterally impeach defendant's answers on cross-examination as to his commission of other offenses of like nature.

Defendant's cross-examination disclosed that he had on various occasions when out with a boon companion driving in his automobile around the streets of Grand Rapids picked up and taken riding with them girls willing to accept their invitations and companionship. He admitted acquaintance formed in that way with several girls they had first met upon the street and taken riding. Pressed as to his conduct with them he admitted congenial associations but positively denied sexual intercourse or any improper conduct with them. During the course of his protracted cross-examination the prosecuting attorney pointed out several young women or girls he had brought into court, one with a baby in her arms, and interrogated defendant in regard to them. Defendant admitted knowing them and to having taken them riding in his car, but insisted in denial of accusing questions that his conduct when with them had always been honorable, and he had acted like a gentleman. Taking as his text defendant's claim that he "acted like a gentleman," the prosecuting attorney theatrically featured his cross-examination against objection of defendant's counsel by calling up and pointing out the girls he had arrayed in court and catechizing defendant as to his relations with them in part as follows:

"You said every girl you took out you acted as a gentleman with them?

"*A.* Yes, sir.

"*Q.* You are swearing to that, are you?

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"*A.* Yes, sir.

"*Q.* Mabel (addressing Mabel Zevalkink), who is this girl standing up (referring to Mabel Zevalkink)?

"*A.* Her name is Mabel. I don't know her last name.

"*Q.* Has she ever been in your machine?

"*A.* Yes, sir.

"*Q.* Ever had intercourse with her?

"*A.* No, sir.

"*Q.* How often has she been in your machine?

"*A.* About three times. * * *

"*Mr. D—.* I want to object, if the court please, to this line of cross-examination. I don't think it is competent. It is prejudicial. He is on trial for an act of intercourse on the 24th of May.

"*Mr. H—.* He, himself, on direct-examination, your honor, said that every girl he took out he acted as a gentleman. * * *

"*The Court*—I think that is proper on cross-examination.

"*Q.* Josephine DeWinter (addressing a girl sitting in the court room), will you please stand up? (Whereupon Josephine DeWinter stood up.) Do you know that girl (referring to Josephine De Winter)?

"*A.* Yes, sir.

"*Q.* She has been in your machine?

"*A.* Yes, sir.

"*Q.* How often?

"*A.* Not much.

"*Q.* How?

"*A.* Not much, about 3 or 4 times.

"*Q.* Where did you take her to?

"*A.* Around the city.

"*Q.* Did you ever take her out in the country?

"*A.* No, sir.

"*Q.* What time of the day or night?

"*A.* Early.

"*Q.* What time I asked you?

"*A.* About 9 or 10 o'clock. * * *

"*Q.* Did you have intercourse with Josephine?

"*A.* No, sir.

"*Q.* You had sexual intercourse with her?

"*A.* No, sir.

"*Q.* You had sexual intercourse with Mabel Zevalkink and she had a baby by you?

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"*Mr. D*—. That is improper. If he did he would have been arrested a long time ago.

"*Mr. H*—. Not at all. I will put her on the stand.

"*Q.* Isn't the baby she has now (referring to baby in Josephine DeWinter's arms) a baby born to her by you, the girl you had out 3 or 4 times, didn't you?

"*A.* 3 or 4 times.

"*Mr. D*—. I object to all this line of cross-examination. * * *

"*Q.* Did you pick up the other girl that way, Frances DeGraff? Do you know her? She has been in your car?

"*A.* Yes, sir.

"*Q.* You picked her up that way?

"*A.* Yes, sir.

"*Q.* You had intercourse with her, too, didn't you?

"*Mr. D*—. I object to that.

"*The Court.* He can claim his constitutional privilege.

"*A.* She rode in my car.

"*Q.* How often had she rode in your car?

"*A.* 4 or 5 times. * * *

"*Q.* Isn't that what you did every night, right along, pick up girls on the street?

"*A.* Impossible. * * *

"*Q.* You mean when you made the answer 'impossible,' you mean to say perhaps it was impossible to have intercourse every night?

"*A.* No, sir.

"*Mr. D*—. That question is objected to. It is prejudicial, put in purely to prejudice the jury.

"*Mr. H*—. Oh, no, he has prejudiced himself. * * *

"*Q.* Have you heard your machine called the 'whorehouse?'

"*A.* No, sir, no such thing in the world. I never did.

"*Q.* Are there any of these girls Lithuanians?

"*A.* No, I don't know. * * *

"*Q.* If you were honorable with them why didn't you stick to one girl?

"*A.* I tried, that was impossible.

"*Q.* That is impossible, too. What is impossible about that?

"*A.* I tried to stick with Mildred.

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"Q. School girl, school girl?
"A. She told me she was 18 years old * * *
"Q. Did you want to have intercourse with them?
"A. No, sir.
"Q. Why not?
"A. Because I didn't care to, all I wanted was just to ride around, and pass the time away after work.
"Q. Why didn't you ride around with some men?
"A. I did.
"Q. Why didn't you let the little girls alone?
"A. Couldn't a fellow go out with a girl once in a while?
"Q. Yes, if they do it clean."

Having concluded his lengthy cross-examination of defendant by a series of accusing and assertive leading questions portraying as asked dissolute and criminal relations of like nature with other girls, the prosecuting attorney called three girls he had in the court room and pursued the subject further with them. The testimony of two of them produced nothing by way of rebuttal of importance. Both testified that they had been taken riding by defendant in his automobile, that they had previously been properly introduced to him, one by her aunt, and neither gave evidence of any immoral conduct. The third was Mabel Zevalkink, as to whom the prosecuting attorney had asked defendant if he had sexual intercourse with her and asserted he would "put her on the stand." She was a married woman carrying an infant born in lawful wedlock. She testified that she was married December 27, 1920, and her baby was born on the 24th of the following June, and that in the summer of 1920 she had on different occasions gone out with defendant and also with other boys. When the prosecuting attorney asked her if "Gengels has had intercourse with you" the court sustained the objection of defendant's counsel that it was a prejudicial effort of the prosecution to impeach defendant on a collateral matter. The prosecuting attorney however insisted

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and argued in the presence of the jury that it was permissible in rebuttal of defendant's testimony that he was a gentleman with the girls he took out, and also because the offense charged required intent, for which reasons the prosecution was entitled to show his conduct with other girls as well as to test his credibility. The ruling being adhered to he asked "whether or not he told you—I ask this question for impeachment purposes and laying the foundation for it, if he had been in trouble before and if he had got out of it." Objection to this was overruled, but on her answering, "He didn't tell me, Andy Putt said he did," the answer was stricken out. Amongst others the following questions and answers were permitted:

"*Q.* Is that your baby? (Indicating.)
"*A.* Yes, sir.
"*Q.* Did Gengels try to get you to go to a west side midwife to have an operation performed?
"*A.* Yes. * * *
"*Q.* To a married man's wife, that would be a midwife, did you go?
"*A.* No.
"*Q.* And as a result of that, that is the baby?
"*A.* Yes.
"*Mr. D*—. I want the record to show this baby talked about so much, was brought into the court room so the jury could see it, all of it being purely prejudicial.
"*Mr. H*—. All right, I will go further.
"*Q.* Who is the father of your baby?"

Objection to this question being sustained, the subject was approached as follows:

"Did he act as a gentleman with you when he was with you?
"*A.* No, sir.
"*Q.* To what extent did he go?"

This question was repeated after suggestion by the court that there were varying degrees of gentlemanliness, and ruled out.

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Commenting on this ruling counsel for the prosecution said:

"It happens to be on the very subject-matter, which, of course, this trial is about. It also—well, it attacks his credibility and as this is on another subject-matter, the court would permit it because it is on the same subject-matter, but tends to show another offense, then, it is excluded. Just as I say, I don't do it for the purpose of showing another offense of a similar kind, but to attack his credibility as a witness that he himself opened the door to."

While within broad limits the latitude of a cross-examination is within the trial court's discretion the course pursued here makes well in point the following reflection in 1 Wharton's Criminal Evidence (10th Ed.), § 52:

"Judgments of conviction have frequently been set aside because of the conduct of counsel for the prosecution in stating and insinuating other offenses than the one for which the accused was on trial, either in argument, or by repeatedly asking rejected questions and commenting on what the answers would have been if allowed."

That a witness cannot be impeached on his answers to questions on cross-examination upon collateral matters is elementary. It is also a well established general rule that upon a trial for felony the prosecution may not introduce evidence tending to prove that accused has been guilty of other distinct and independent crimes for the purpose of proving he committed the offense charged. An exception to the rule recognized in this and many other jurisdictions is in that class of crimes where guilt depends upon the intent, guilty knowledge and purpose with which the act charged is done, as some overt act with intent to commit some felony not actually accomplished, or where a series of connected frauds, forgeries, passing counterfeit money, etc., is held competent as tending to estab-

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lish guilty knowledge and criminal intent. But in the crime charged here proof of the intent goes with proof of the act of sexual intercourse with a girl under the age of consent. It is not necessary for the prosecution to prove want of consent. Proof of consent is no defense, for a female child under the statutory age is legally incapable of consenting. Neither is it any defense that the accused believed from the statement of his victim or others that she had reached the age of consent. 33 Cyc. p. 1438, and cases cited.

In cases involving statutory rape, a qualified exception to the general rule only permits proof of intercourse between the prosecutrix and accused for the purpose of showing opportunity, disposition of the parties and intimate relations tending to break down self-respect and modesty. *People* v. *Abbott*, 97 Mich. 484 (37 Am. St. Rep. 360); *People* v. *Williams*, 133 Cal. 168 (65 Pac. 323); *State* v. *Lancaster*, 10 Idaho, 410 (78 Pac. 1081); *State* v. *Trusty*, 122 Iowa, 82 (97 N. W. 989). In the instant case the prosecuting attorney asserted and spectacularly attempted to directly prove, "On the very subject-matter, of course, this trial is about," another rape committed upon another girl at a different time, having no connection with the crime charged, speciously insisting before the jury and attempting indirectly to prove by further suggestive questions the very subject-matter which the court had excluded, claiming that it was admissible by way of impeachment. The course pursued was prejudicial error.

The judgment is reversed and a new trial granted.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, SHARPE, and MOORE, JJ., concurred.

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PEOPLE *v.* ROSE.

1. CRIMINAL LAW—PHYSICIANS AND SURGEONS—ILLEGALLY PRACTICING AS A CHIROPRACTOR—INFORMATION—DUPLICITY—AMENDMENT.

In a prosecution for violating the provisions of Act No. 237, Pub. Acts 1899, as amended, by engaging as a chiropractor in treating human ailments and diseases without having filed a certificate of registration or copy thereof with the county clerk, as required, it was not error for the trial court to deny defendant's motion to quash the information for duplicity, where the prosecutor, after being required to elect, moved to amend, and the court ordered the information so amended and struck out what then became surplusage.

2. SAME—ORIGINAL STATUTE UNAFFECTED BY VOID AMENDMENT.

Even if Act No. 368, Pub. Acts 1913, amending Act No. 237, Pub. Acts 1899, is unconstitutional because in authorizing the State medical examining board to grant certificates of registration to those applying it is unreasonable, arbitrary, and discriminatory, defendant may still stand convicted of violating the provisions of said original act in practicing as a drugless healer for hire and reward without having filed a certificate of registration with the clerk of the county where he resides as required by said act.

3. SAME—MERITS OF SYSTEM OF HEALING QUESTION FOR LEGISLATURE.

The question of the merits of a system of healing pursued for profit is for the legislative body which enacts the laws regulating its practice, and not for the courts.

4. SAME—UNCONTRADICTED FACTS PRESENTED QUESTION OF LAW—CONSTRUCTION FOR COURT.

Where the testimony of uncontradicted witnesses showed that defendant admitted he was not registered as a chiropractor, that he had not filed a certificate of registration with the clerk of the county in which he resided and that during the period alleged he had treated various affected

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On application of statutes regulating the practice of medicine to persons giving special kinds of treatment, see notes in 33 L. R. A. (N. S.) 179; L. R. A. 1917C, 823.

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persons for hire, the trial court was not in error in instructing the jury that it was their duty to find defendant guilty as charged, since the undisputed facts presented a question of law for the court which was rightly construed.

Exceptions before judgment from Wexford; Lamb (Fred S.), J. Submitted April 14, 1922. (Docket No. 130.) Decided June 5, 1922.

Arthur L. Rose was convicted of engaging as a chiropractor without filing a certificate of registration. Affirmed.

A. W. Penny (*Morris, Winter, Esch & Holmes*, of counsel), for appellant.

W. H. Yearnd, Prosecuting Attorney, for the people.

STEERE, J. Defendant was tried and convicted in Wexford county circuit court of violating the provisions of Act No. 237, Pub. Acts 1899, as amended and supplemented by later legislation, by engaging as a chiropractor in treating human ailments and diseases, at the city of Cadillac in said county, on July 1, 1920, and at divers times between that day and February 20, 1921, without having filed a certificate of registration, or copy thereof, with the clerk of the county in which he resided, as the act requires. When arraigned the defendant stood mute and a plea of not guilty was entered by order of the court in his behalf. His counsel then moved to quash the information on various grounds which was denied. At conclusion of the proofs the court refused his counsel's request for a directed verdict of not guilty, and instructed the jury that under the undisputed evidence it was their duty to find defendant guilty. Upon the trial the prosecution proved without dispute that defendant resided in Cadillac where he maintained an office and

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there as a chiropractor treated for pay, by that system of drugless therapeutics, various patients during the time charged without having filed any certificate of registration authorizing him to practice, or copy thereof, with the clerk of Wexford county in which he resided, and when interrogated on the subject said that he was not registered to practice as a chiropractor under the statute and there was no provision made whereby he could be.

Defendant did not take the stand as a witness in his own behalf but produced witnesses who testified to his good character, that he was a graduate of the Palmer Chiropractic school of Davenport, Iowa, and that the adjustments and treatments by manipulation according to the methods of that system of therapeutics administered by him to certain witnesses while practicing in Cadillac had benefited them.

The case is here on exceptions before sentence. Defendant's assignments of error are directed against the refusal of the court to quash the information, to direct a verdict of not guilty, charging the jury to render a verdict of guilty and, underlying the entire proceeding, "holding that the section of the statute upon which the prosecution is planted is valid and constitutional, and not arbitrary and discriminatory."

Following introductory matter the single count of the information reads as follows:

—"that Arthur L. Rose, a chiropractor late of the city of Cadillac of the county of Wexford, on the first day of July nineteen hundred and twenty and on divers days and times between said day and the 22d day of February, A. D. 1921, at the city of Cadillac and in the county aforesaid, did then and there wilfully and illegally advertise and hold himself out to the public as being able to treat, cure and alleviate human ailments and diseases without the use of drugs, or medicines internally or externally and did then and there for hire and reward, advise as to health and disease divers persons and did then and there attempt

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to treat, cure and relieve human diseases, ailments, defects and complaints of physical or mental origin, by attendance, advice and manipulation divers persons without the use of drugs or medicines internally or externally and did then and there treat and attempt to cure of ailment and disease, one Ladd Rattenberry, and divers other persons then and there consulting him without the use of drugs or medicines internally or externally, he, the said Arthur L. Rose during the aforesaid time not being the lawful possessor of a certificate of registration and license issued and held in accordance with the provisions of Act No. 237 of the Public Acts of 1899 of the State of Michigan and the acts amendatory thereof and supplemental thereto, and he, the said Arthur L. Rose not having filed said certificate of registration or a certified copy thereof with the county clerk of Wexford county, said county being the place of residence of the said Arthur L. Rose. Contrary to the statute in such cases made and provided, against the peace and dignity of the people of the State of Michigan."

The only ground of defendant's motion to quash this information suggesting serious consideration was that it "is bad for duplicity because it attempts to charge two separate and distinct offenses in the same count." On argument of the motion the court suggested that the prosecution should elect, and the prosecuting attorney did so by moving to amend and "charging the respondent with practicing drugless treatment under the act and not having his certificate of registration filed with the clerk of this county." The court ordered the information so amended, striking out what then became surplusage, and confining the offense charged to failure to file a certificate of registration with the county clerk. Defendant was again arraigned under the information as amended, and, standing mute, a plea of not guilty was entered in his behalf as before. A jury was thereafter called and the case tried under the charge contained in the amended information.

As the case was tried, and the court carefully ex-

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plained to the jury, the sole issue was whether within the time charged defendant had practiced his system of drugless healing without having filed a certificate of his registration with the county clerk as the law required. The election to proceed under that charge was made prior to commencement of the trial. In *People* v. *Kenyon*, 201 Mich. 647, where a like situation arose in a prosecution under the same statute, a motion to quash the information for duplicity was denied and the prosecution required to elect, but did not do so until conclusion of the people's case and no reversible error was found in the record.

Most of the grounds of unconstitutionality urged by defendant against this act were passed upon by this court in *Locke* v. *Ionia Circuit Judge*, 184 Mich. 535, and need not be again reviewed. The same law was there under consideration and the defendant charged with practicing drugless healing of like kind as in the instant case in violation of the act. Act No. 368, Pub. Acts 1913, amending Act No. 237 of 1899, authorizing examination and registration of persons having specified qualifications, and desiring to practice certain systems of drugless healing, which includes chiropractors, was involved and discussed. Counsel here particularly urge that portion of the act is unconstitutional because unreasonable, arbitrary and discriminatory in that it does not require but only authorizes the State medical examining board to grant certificates of registration to applying chiropractors and other drugless healers who comply with the specified requirements, while the act elsewhere provides that the board *shall* grant a certificate to qualify applicants from the so-called regular school of medicine, making it mandatory as to the latter but optional as to the former, and giving arbitrary power of refusal to a body composed entirely of members from a different and hostile school of healing, not versed in the

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philosophy and science of the chiropractic system. Various other differences between the requirements for registration in the amendment of 1913, applying to systems of drugless healing, and those in other portions of the act, applying to regular physicians and surgeons, are urged as unreasonable, discriminatory and unconstitutional.

We are not prepared to hold that the language of the amendment gives the board of registration power to ignore the various provisions it contains on the subject of registration and arbitrarily refuse a certificate of registration to an applicant having the qualifications specified at length as entitling him thereto. No arbitrary action or refusal in fact is shown as to defendant. There is no evidence or claim that he ever made application to the board for registration. But conceding for the purposes of this case that the amendment of 1913 is unconstitutional, it yet leaves the original act of 1899 with its other amendments standing, as before the invalid amendment, with no provision authorizing registration of chiropractors, or any other persons desiring to practice a drugless system of treatment of human ailments, and defendant still stands convicted under an information charging violation of said Act No. 237 in practicing as a drugless healer for hire and reward without having filed a certificate of registration with the clerk in the county where he resides as specified in that act.

The witness called by defendant to prove he was a graduate of the Palmer school of chiropractic located at Davenport, Iowa, was also a graduate of that school and against objection by the prosecution was allowed to testify that "the practice of chiropractic is not the practice of medicine at all," and to explain the methods and merits of that system, the court saying to defendant's counsel when the objection was discussed:

"We will take the testimony, but this will eventually

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result in a question of law in my judgment; but if you want to make the record, confine the question of chiropractic in the different branches and it is all right."

At conclusion of that line of testimony the prosecuting attorney renewed his objection and moved to strike it out because immaterial to the issue in the case, irrelevant and incompetent. The court thereafter struck out, as immaterial to the issue involved, "testimony on the part of the respondent bearing upon the merits of chiropractic," so advising the jury in the charge.

Counsel for defendant contend such testimony was competent and raised an issue for the jury, its legitimate purpose being to show chiropractic "is a recognized school of healing within the definition; that it is valuable to the people and cannot be injurious;" and though under its police power the State may regulate, "it cannot constitutionally forbid the following of a valuable business or the practicing of a valuable profession."

If the constitutionality of the law was triable by jury the merits of defendant's system or school of practice would not furnish the test. The question of the merits of a system of healing pursued for profit is for the legislative body which enacts the laws. This court said in the *Locke Case* upon the subject of chiropractic, which defendant was there charged with practicing in violation of this act:

"It may be all he claims for it, but it is a calling directed to the serious business of treating human ailments for the purpose of restoring the sick to health, and directly related to public health, to protect which is peculiarly within the police power of the State."

The court committed no error in instructing the jury that the material facts were undisputed and under the law, which it was for the court to construe, it was their duty to find the defendant guilty as

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charged. The testimony of uncontradicted witnesses produced by the prosecution showed that defendant admitted he was not registered as a chiropractor, that he had not filed a certificate of registration with the clerk of the county in which he resided, that during the period alleged he had treated various affected persons for hire, which was corroborated by certain of his own witnesses who had been treated by him.

In this case the court did not cross the border line of respective duties as defined by this court, and imperatively command or compel a verdict. The court told the jury what facts must be proven to constitute the offense, that those facts were established by competent proof and not disputed, that the case had practically resolved itself into a question of law, and under the law as applied to the undisputed facts it was their duty to find the defendant guilty. The jury by direction of the court then retired to their jury room in the usual manner, where they were privately together to consider of their verdict to be given, and after a time returned into court and rendered their verdict.

In *People* v. *Warren*, 122 Mich. 504 (80 Am. St. Rep. 582), which was reversed because the court assumed to compel a verdict when the jury was unwilling to render a verdict of guilty in accordance with instructions by the court that such was their duty, it is said:

"The right of the trial judge to direct the jury in relation to the law of the case is not conceded in all of the courts, but, as we have already seen, that question is no longer an open one in this State. When, in addition to that right, it was held that, in cases where the facts were admitted, the trial court might direct the jury to return a verdict of guilty, the border line separating the functions of the trial judge from the province of the jury was reached."

In *People* v. *Elmer*, 109 Mich. 493, it is said:

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"The offense was a misdemeanor. In such cases, when the facts are admitted or are undisputed, it is the duty of the courts to instruct juries that the facts proven constitute the offense. There was no question of fact for the jury to pass upon. The conclusion is one of law, and not of fact. Guilt follows, as a matter of law, when the facts are undisputed."

The facts here were undisputed and only a question of law as applied to the undisputed facts was involved. The trial court rightly applied the law to the facts. In *People* v. *Neumann*, 85 Mich. 98, it is held that in such case a new trial will not be granted.

The conviction is affirmed, and the case remanded for such judgment thereon as the trial court may determine.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, SHARPE, and MOORE, JJ., concurred.

QUINN *v.* NEW YORK LIFE INSURANCE CO.

1. APPEAL AND ERROR—REMEDY IN CASE OF ADVERSE DIRECTED VERDICT.

   Where the trial court denied defendant's motion for a directed verdict without reserving decision thereon or submitting the case to the jury, and directed a verdict for plaintiff, defendant's remedy was by motion for new trial or review in the Supreme Court by writ of error.

2. JUDGMENT—CONCLUSIVENESS—DIRECTED VERDICT—NEW TRIAL.

   When a verdict is directed, the judgment entered thereon

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is final; and when judgment is set aside a new trial should be granted.

3. SAME—SETTING ASIDE JUDGMENT—NON OBSTANTE VEREDICTO. Where judgment for plaintiff was entered on a directed verdict, the issue not having been submitted to the jury, the trial court was without authority, under 3 Comp. Laws 1915, § 14568, on defendant's motion for a new trial, to set aside the judgment entered and enter judgment for defendant *non obstante veredicto*, but, the evidence being conflicting, the motion for a new trial should have been granted.

Error to Muskegon; Vanderwerp (John), J. Submitted April 21, 1922. (Docket No. 102.) Decided June 5, 1922.

Assumpsit by Agnes M. Quinn against the New York Life Insurance Company on a policy of insurance. Judgment for defendant *non obstante veredicto*. Plaintiff brings error. Reversed.

James E. Sullivan, for appellant.

Cross, Foote & Sessions, for appellee.

STEERE, J. Plaintiff's husband, Leo J. Quinn, was killed by a passing taxicab as he was leaving a street car on which he had ridden to a regular stop at the corner of Lake and Addison streets near his home in the city of Muskegon. He held a life insurance policy issued by defendant for $4,000 with plaintiff as beneficiary, which contained a so-called double indemnity clause, providing for payment of double the face of the policy ($8,000) if death of the insured "was caused directly by accident while traveling as a passenger on a street car" or other named public conveyance operated as a common carrier. Defendant paid the straight life insurance of $4,000 on proof of death, but denied double liability under the accident clause in the policy on the ground that deceased had

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reached the end of his ride, left the street car and started for the curb when struck by the taxicab, and the relation of a passenger and carrier had ceased at the time of the accident. The case was tried by jury on that issue. At the close of plaintiff's testimony a motion for a directed verdict in defendant's favor was made and denied. After defendant had introduced its testimony and both parties rested the motion for a directed verdict in defendant's favor was renewed and argued, after which the court adjourned for the day. On the following morning, May 26, 1921, defendant's motion for a directed verdict was denied and the court directed the jury to render a verdict in plaintiff's favor for $4,177.80. Verdict was taken without the jurors leaving their seats. Judgment for that amount was rendered thereon by the court and duly recorded. The next day defendant moved for a new trial on various grounds. The motion was argued and submitted. On July 19, 1921, the court filed an opinion denying said motion for a new trial, but concluding that an error had been committed in directing a verdict for plaintiff and entering judgment thereon. In his opinion the judge made reference to section 14568, 3 Comp. Laws 1915, called the Empson act, saying in conclusion:

"Inasmuch as that section provided that a motion for judgment notwithstanding the verdict can only be entertained before judgment, the motion for a new trial will be denied, the judgment heretofore rendered upon the verdict will be set aside, in order that defendant will have the opportunity to make a motion under section 14568, above cited, for a judgment notwithstanding the verdict rendered, if it desires to do so."

Defendant thereafter made a motion for judgment *non obstante* and after hearing argument the court set aside its former judgment on a directed verdict in favor of plaintiff, and rendered a judgment for defendant of no cause of action *non obstante veredicto*.

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Counsel for plaintiff contends that the only action the court could have taken as the record then stood was to grant or deny defendant's motion for a new trial, and the course pursued was prejudicial error. The statute under which the court assumed to act (§ 14568), provides that:

"* * * If either party shall at the close of the testimony, and before the case is submitted to the jury, request the court for a directed verdict in his favor, the court may reserve decision thereon, and submit the case to the jury under proper instructions as to the law applicable to such case. After the case is thus submitted to the jury, or after receiving and recording the verdict of the jury and before judgment is entered in said case, the court may hear arguments of counsel for and against said request, but in all such cases shall receive and record the verdict of the jury as rendered. If the court shall then decide as a matter of law, that the party requesting the directed verdict was entitled thereto, and if the verdict of the jury is adverse to the party making such request, the court shall enter its decision on the record and order judgment in accordance with such decision notwithstanding the verdict entered, and the party against whom such judgment is entered shall have an exception," etc.

So far as the record discloses no mention was made of the Empson act by court or counsel at the time of the trial nor until nearly two months after the trial had ended in a final judgment on directed verdict for plaintiff. When the trial was in progress and defendant requested a directed verdict in its favor at close of the testimony, the court did not reserve decision thereon nor submit the case to the jury for their verdict under instructions as to the law which should guide them in their deliberations and take their verdict upon the claimed issues of fact as to which testimony had been introduced, but unconditionally and without any suggestion of reserved decision from any source denied defendant's motion, directed an apparently unrequested verdict for plaintiff and entered

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judgment accordingly. As the record then stood with final judgment against defendant, its only rights thereafter were an appeal to this court for review by writ of error or motion in that court for a new trial, which it timely made. No right to move for a verdict *non obstante* was reserved to or claimed by it, nor had anything in the nature of consent by counsel or intimation by the court during the trial given ground for so claiming.

Both sides introduced testimony as to the circumstances of the accident, directed to the question of whether deceased was when struck by the taxicab yet a passenger on the street car. Plaintiff claimed there was testimony showing he was killed while in the act of alighting, while defendant contended that he had then safely left the car and as a foot traveler on the highway was walking or running towards the curb. There was evidence to that effect and, in any aspect of the case, plaintiff was not entitled to a directed verdict. The trial court rightly so concluded after hearing defendant's motion to set aside the directed verdict and judgment thereon, and grant a new trial.

The motion should have been granted. The general rule is that: "When a verdict is directed, the judgment entered thereon is final; when one is set aside, a new trial is granted." *Randolph* v. *Railway*, 213 Mich. 100. The Empson act does not contemplate a directed verdict in the first instance. Its manifest intent and purpose is a reserved verdict of the jury on the claimed issues of fact as the case stands at the close of the testimony, available for judgment thereon in case the court being in doubt as to the propriety of the motion for a directed verdict desires to reserve judgment and take further time for consideration of the evidence and legal questions involved, being by the act given authority to render judgment on said verdict, if the court later determines after hearing counsel

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that there was an issue of fact to go to the jury, or to ignore it if the case only involves issues of law and render judgment accordingly.

The judgment is therefore reversed and a new trial granted, with costs to plaintiff.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, SHARPE, and MOORE, JJ., concurred.

WACKENHUT v. WASHTENAW CIRCUIT JUDGE.

1. JUSTICES OF THE PEACE—APPEAL FROM JUSTICE'S COURT—DUTY OF APPELLANT TO PERFECT INCOMPLETE RETURN.

   On appeal from a judgment in justice's court, the duty is on appellant, if the justice's return is defective or incomplete, to perfect same or abide the judgment as it stood.

2. SAME—MOTION TO DISMISS APPEAL—INCOMPLETE RETURN.

   Where it is conceded that the justice's return was incomplete, and appellant took no steps to perfect same within a reasonable time, appellee's motion to dismiss the appeal should have been granted.

3. SAME—ESTOPPEL.

   Appellee was not estopped from moving to dismiss the appeal by reason of his counsel's inapt proposal that if it devolved upon him to perfect the appeal, permission be granted him to make the amendment and then proceed to trial immediately, where his suggestion was not acquiesced in by the court.

4. MANDAMUS—MOTION TO DISMISS APPEAL—PRACTICE—JUDICATURE ACT.

   Under the judicature act (3 Comp. Laws 1915, § 13438), it

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was not necessary for appellee to first apply to the trial court to set aside the order denying dismissal before petitioning for mandamus to compel its vacation.

Mandamus by Martin J. Wackenhut to compel George W. Sample, circuit judge of Washtenaw county, to vacate an order denying a motion to dismiss an appeal. Submitted April 18, 1922. (Calendar No. 29,938.) Writ granted June 5, 1922.

Stivers & Laird, for plaintiff.

Cobb, Bisbee & Wilson, for defendant.

STEERE, J. In an action brought in justice's court of Washtenaw county by Martin J. Wackenhut, plaintiff herein, against Walker D. Hines, director general of railroads, judgment was rendered in favor of plaintiff on June 20, 1919, for $100 and costs. On June 23, 1919, defendant Hines by his attorney filed an affidavit on appeal to the circuit court with the justice before whom the case was heard, and on June 25, 1919, said justice filed in the circuit court of Washtenaw county his return on appeal together with the affidavit for appeal previously filed with him. On March 21, 1921, said cause was called for trial in the circuit court and plaintiff's counsel advised the court they were ready to proceed. Counsel for defendant thereupon objected to proceeding with the trial on the ground that the justice's return was not satisfactory nor sufficiently complete for the case to be heard, saying in part:

"There is nothing on the face of the record to show the justice has jurisdiction, and there is nothing to show this court his appearance. I cannot see where there is anything that should require us to go to trial on this record. We want judgment for the defendant and to have the proceeding quashed."

Plaintiff was satisfied with his judgment in justice's

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court, had taken no steps to appeal from or have the same set aside, and his counsel stood ready to proceed with the trial and disposition of defendant's appeal. The circuit judge held with defendant's counsel that the return was not full enough to give jurisdiction to proceed with the trial, and said "You have the right to require the justice to make a return that is perfect," that the case would be held over for a proper return to be made, and signed the following order which was entered in the court journal: "The above cause held open until proper returns are made."

The position of defendant's counsel, then and later, seems to have been that failure of the justice to make sufficiently full return to his appeal to give the appellate court jurisdiction was to his advantage and if plaintiff did not attend to securing a proper return defendant was entitled to a judgment and to "have the proceedings quashed."

On April 18, 1921, plaintiff served a motion to dismiss the appeal, supported by affidavits, on defendant's attorneys, for hearing on April 23d, at which time both parties appeared by counsel. After hearing argument the court made and recorded the following order:

"Martin J. Wackenhut *v.* Walker D. Hines, Director General of Railroads.

"Upon motion of attorney William Laird to dismiss the appeal which motion was denied. Court allowed ten dollars motion fee to defendant's counsel.

"Whereupon court adjourned until Monday, April 25, 1921."

Plaintiff thereafter applied to this court for a writ of mandamus directing the circuit judge to vacate said order of denial and dismiss defendant's appeal. The return to an order to show cause why the same should not be granted admits all allegations in the sixth para-

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graph of plaintiff's petition which amongst other things alleges: "nor has said defendant taken any proceedings or steps whatsoever to have said return on appeal perfected and corrected or to prosecute said appeal with diligence."

When defendant's counsel objected to proceeding with the trial, asking "judgment for defendant and to have the proceedings quashed" because the defective return of the justice did not give the circuit court jurisdiction, plaintiff's counsel insisted on proceeding with the case, making in the discussion an inapt proposal that if it devolved upon plaintiff to do so permission be granted him to make the amendment, inquiring if they could not "have it corrected and go on to trial immediately." The court in reply held that could not be done as "defendant would be entitled to time within which to appear."

Defendant's counsel argue an element of estoppel in the attitude of plaintiff's counsel when proposing to make or assist in making amendments to the justice's return forthwith, saying in their brief he "made no contention that the motion was not in order or was unfounded; made no application for dismissal of the appeal, as he might have done; made no claim that it was not incumbent upon plaintiff to perfect the appeal, but stated to the court—'If it devolves upon us to make this appeal, we ask to be permitted to make the amendment." While some unusual propositions were advanced by both sides in that discussion, it is plain that plaintiff's counsel consistently urged a prompt disposition of the case and made overtures to that end until the court by a short order continued the case "until proper returns are made," without directing who should make them. We find nothing in what then took place to preclude plaintiff from moving to dismiss defendant's admittedly defective appeal after sufficient time had

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elapsed for him to secure a further return if desired.

Plaintiff had obtained a judgment with which he was content. It was his right to maintain it by all legal means and his interest to avoid the expense, uncertainty and delay of an appeal and re-trial. The order complained of hung the case up indefinitely between the two courts, and permanently on defendant's theory, unless plaintiff assumed the burden of securing a further return to help out defendant's incomplete appeal.

It was the duty of defendant to prosecute his appeal with all due diligence to a decision in the circuit court. If the justice's return was defective he could and should if he wished re-trial in the circuit court apply within a reasonable time to that court for an order directing the justice to make further return. He was asking relief by appeal from a judgment already obtained and standing against him. It was his appeal and his duty to perfect it or abide the judgment as it stood. No authority to the contrary is cited by defendant. As confirmatory of his proposition *vide Wiley* v. *Allegan Circuit Judge,* 29 Mich. 486; *Nowlin* v. *Tibbits,* 44 Mich. 77; *Maxwell* v. *Deens,* 46 Mich. 35; *Lord* v. *Ellis,* 9 Iowa, 301; *Goodman* v. *Allen,* 72 Iowa, 616 (34 N. W. 445); *Young* v. *School District,* 119 Mo. App. 108 (95 S. W. 947); *Mitchell* v. *Stephens,* 23 Ind. 468; *Smith* v. *Allen,* 31 Ark. 268.

Defendant further contends with citation of sustaining decisions by this court that plaintiff's application for mandamus cannot be entertained because he did not first apply to the trial court to set aside its order denying dismissal. Unfortunately for the contention, that rule of practice and the decisions sustaining it have been relegated to the "good but obsolete" discard, since passage of the judicature act which provides (3 Comp. Laws 1915, § 13438):

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"In all cases where any order or determination of any court or judge shall be reviewable in mandamus proceedings, if such order or determination was made after hearing counsel in opposition thereto, it shall not be necessary to make a motion for the vacation of such order or determination before instituting mandamus proceedings to review the same."

The writ of mandamus will issue as prayed for.

FELLOWS, C. J., and WIEST, MCDONALD, CLARK, BIRD, SHARPE, and MOORE, JJ., concurred.

PEOPLE *v.* CZCKAY.

1. INTOXICATING LIQUORS—SEARCH WARRANT—JURISDICTION.

   In a prosecution for violating the liquor law, where the affidavit upon which the search warrant was issued contained positive averment of facts justifying the issuance of the writ, the jurisdiction of the magistrate to issue it was not lost by proof *aliunde* that the facts therein positively stated were in reality upon information and belief.

2. SAME—CRIMINAL LAW—INFORMATION — WHERE TWO DISTINCT OFFENSES CHARGED ELECTION REQUIRED.

   Where the information charged, in the first count, that defendant, on the 26th day of July, 1921, unlawfully had in his possession prohibited liquors, "to wit, two gallons of moonshine whisky so-called," and in the second count, that defendant on the same date sold to a certain person "one pint of moonshine whisky so-called," but the proofs showed that the sale alleged was made on July 24, 1921, the trial court was in error in not requiring the prose-

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cutor to elect on which count he would go to the jury, since the proofs showed two separate and distinct offenses, requiring different proof.

Exceptions before judgment from Jackson; Parkinson (James A.), J. Submitted April 14, 1922. (Docket No. 121.) Decided June 5, 1922.

Joseph Czckay and another were convicted of violating the liquor law. Reversed.

John F. Henigan, for appellants.

M. Grove Hatch, Prosecuting Attorney, and *Arthur W. Wiggins,* Assistant Prosecuting Attorney, for the people.

FELLOWS, C. J. The information in this case contains three counts. The first count charges that on the 26th day of July, 1921, defendant unlawfully had in his possession prohibited liquors "to-wit: two gallons of moonshine whisky so-called." The second count charges defendant with selling to one Walter Cooper on July 26, 1921, "one pint of moonshine whisky so-called." The third count charges the defendant with keeping a place where the prohibited liquors "were manufactured, sold, stored for sale, given away and furnished," on the 26th day of July and for some time prior thereto. Upon the trial the proofs disclosed that on July 26, 1921, the officers, armed with a search warrant, searched defendant's place and found a quantity of moonshine whisky which was seized; upon a chemical analysis it disclosed a high alcoholic content; it was offered and received in evidence. The proof also disclosed that the sale to Walter Cooper was on the 24th day of July, 1921. Defendant's counsel properly saved the right to question the validity of the search and seizure, and that is the first question raised in the brief.

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The affidavit upon which the search warrant was issued contained positive averment of facts justifying the issuance of the writ; it also contained statements as to the sale to Cooper which while tending to establish such sale showed the sale was not made in affiant's presence, and upon the trial the officer who made the affidavit testified that the facts positively stated by him in the affidavit were "upon information and belief." Defendant's counsel therefore insists that the police judge who issued the search warrant did not acquire jurisdiction to issue it. In this contention counsel is in error. The affidavit gave the police judge jurisdiction to issue the writ. This jurisdiction was not lost by proof *aliunde* that the facts therein positively stated were in reality stated upon information and belief. This is settled by numerous decisions of this court. Among them see *People* v. *Lynch*, 29 Mich. 274; *People* v. *Hare*, 57 Mich. 505; *People* v. *Schottey*, 66 Mich. 708; *People* v. *Haas*, 79 Mich. 449; *Potter* v. *Barry Circuit Judge*, 156 Mich. 183.

After the proofs were closed defendant's counsel insisted that the prosecuting attorney be required to elect upon which count of the information the case should go to the jury. The trial judge was apparently quite impressed with the contention of defendant's counsel but upon the insistence of the prosecuting attorney and with some misgivings submitted the case to the jury on all three counts. In this there was error. This case does not belong to that class of cases in which although there are different counts they are all sustained by the same testimony, were committed by the same acts at the same time, of which class of cases *People* v. *Grabiec*, 210 Mich. 559, is illustrative. In that case the information charged transportation and possession of liquor. Manifestly if defendant in that case was transporting liquor he had it in his possession, and the same testimony of the same act

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at the same time established the charge under each count. But it must be equally manifest that evidence of a sale of a pint of liquor to Cooper on the 24th was not evidence that defendant had two gallons of liquor in his possession on the 26th; nor was evidence that defendant had two gallons of liquor in his possession on the 26th evidence that he sold Cooper a pint on the 24th. They were two separate and distinct acts, each constituting a separate and distinct violation of the law. In *Tiedke* v. *City of Saginaw,* 43 Mich. 64, it was held:

"Separate and distinct offenses, committed on different days, cannot be alleged in the same complaint and warrant. They may be charged in different counts of an information, but the prosecutor must elect on which count he will proceed."

In the case of *People* v. *Rohrer,* 100 Mich. 126, there were two counts in the information, one charging that the defendant kept his saloon open on Sunday, the other charging him with keeping the windows of his saloon curtained on the same day; each of these offenses required different proof and proof of one was not proof of the other. This court there held that defendant's counsel was entitled to an election as to the count upon which the case should go to the jury and reversed the case for the refusal of the trial judge to require such election. This case has been cited with approval in *People* v. *Shuler,* 136 Mich. 161; *Chase* v. *Van Buren Circuit Judge,* 148 Mich. 149; *People* v. *Smith,* 177 Mich. 358. See, also, *People* v. *Jenness,* 5 Mich. 305; *People* v. *Keefer,* 97 Mich. 15; *People* v. *Hamilton,* 101 Mich. 87.

For this error the conviction must be reversed and a new trial ordered.

WIEST, MCDONALD, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

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YPSILANTI LUMBER & COAL CO. *v.* LESLIE.

1. MECHANICS' LIENS—EXCESSIVE CLAIM—GOOD FAITH.
   In a suit to enforce a mechanics' lien under 3 Comp. Laws 1915, § 14800, requiring "a just and true statement or account of the demand due him," where a mistake in claiming an excessive amount is not made in bad faith, but there is an honest mistake of fact made in the honest belief of its correctness, the lien will not be lost by reason of the excessive claim.

2. SAME—REQUISITIONS FOR MATERIAL NOT SEPARATE CONTRACTS —GOOD FAITH.
   Although lumber for a coal bin was furnished a considerable time after the furnishing of the great bulk of the material, where it was furnished in good faith, and the owner signed the ticket acknowledging delivery, a lien filed in seasonable time thereafter is valid, since requisitions are made as material is needed, and such requisitions do not make new contracts.

Appeal from Washtenaw; Sample (George W.), J. Submitted April 13, 1922. (Docket No. 61.) Decided June 5, 1922.

Bill by the Ypsilanti Lumber & Coal Company against Wallace Leslie and others to foreclose a mechanics' lien. From a decree for plaintiff, certain defendants appeal. Affirmed.

Floyd E. Daggett, for plaintiff.

John P. Kirk, for defendant Shaefer Hardware Co.

Tracy L. Towner and *D. C. Griffin*, for appellants.

FELLOWS, C. J. This bill is filed to enforce a lien for materials furnished by the plaintiff to defendant Wallace Leslie, owner of the premises, which material

On effect of filing excessive mechanics' lien, see note in 29 L. R. A. (N. S.) 305.

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was used by him in the erection of a dwelling house thereon. Defendant Leslie with other parties had built two other houses but in the construction of this house he alone was interested. Defendants and appellants Ypsilanti Building & Loan Association and Marian Sanderson are mortgagees subordinate to the liens. The other defendants are lienors. Appellants appeal from that portion of the decree which awards relief to plaintiff and to defendant Shaefer Hardware Company, the other liens not being questioned.

When the managing officer of plaintiff was preparing to file the claim of lien he called on the bookkeeper for the figures. The bookkeeper gave him the amount of Mr. Leslie's total indebtedness, $3,130.23, and not the amount due for material which went into the building, $2,126.41. The affidavit filed stated the first amount and the second amount herein stated was the amount found by the court. Upon the trial the officer frankly admitted the mistake and produced the tickets in court showing the actual amount of material which went into the building, made no claim for anything beyond that, and established the lien at the amount found by the court. It is insisted on behalf of appellants that the statement of this excessive amount was not a compliance with the statute (3 Comp. Laws 1915, § 14800) requiring "a just and true statement or account of the demand due him," and for this reason the lien should fail. This provision has been before this court on numerous occasions, and we have on occasion held that the lien must fail where the excess was less than the amount here involved. But we have uniformly held that where the mistake is not made in bad faith but there is an honest mistake of fact made in the honest belief of its correctness, the lien will not be lost by reason of the excessive claim. *Gibbs* v. *Hanchette,* 90 Mich. 657; *Lamont* v. *LaFevre,* 96 Mich. 175; *McMonegal* v. *Wilson,* 103 Mich. 264;

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Scheibner v. *Cohnen,* 108 Mich. 165; *Hulburt* v. *Just,* 126 Mich. 337; *Knowlton* v. *Gibbons,* 210 Mich. 547. The trial judge who heard and saw the witnesses found that there was an honest mistake of fact and no bad faith on the part of plaintiff in making the claim. With this finding we agree and sustain the lien against this objection.

It is also urged that the last item of plaintiff's bill was furnished a considerable time after the furnishing of the great bulk of the material, and it seems to be claimed that this was not furnished in good faith. If we were satisfied that the furnishing of this material was not in good faith, for use in the building, but was made to circumvent the limitation of the statute another question would be presented. But we are not so satisfied. The lumber was ordered for a coal bin in the basement of the house and was delivered on the premises and Mr. Leslie signed the ticket for it. In *Smalley* v. *Gearing,* 121 Mich. 190, it was said:

"The verified statement or account must be filed within 60 days from the date on which the last of the materials shall have been furnished. We think the meaning of the statute is that the 60 days begins to run from the date when the last of the materials shall have been furnished to the owner, or delivered at the building."

And in the recent case of *Sandusky Grain Co.* v. *Condensed Milk Co.,* 214 Mich. 306, 325, we pointed out that material was needed from time to time as the building progressed and that rarely was the material all assembled before the work began, that requisitions are made as material is needed, that such requisitions do not make new contracts, and sustained the liens as against the objection that they were not seasonably filed. Plaintiff's lien in the instant case was filed within the time fixed by the statute and is sustained.

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The amount of the claim of the Shaefer Hardware Company set up in the affidavit was $460.88. The amount found by the court was $197.04. Mr. Shaefer went to his attorney's office to consult him about the matter. His attorney asked him the amount of his claim. He called up the bookkeeper and was given the amount inserted in the affidavit. The trial judge found, and we agree with him, that the mistake was an honest one. What we have already said disposes of this claim.

The decree will be affirmed. Appellees will recover single costs of this court.

WIEST, MCDONALD, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

SELBY *v.* BRADING.

1. JUSTICES OF THE PEACE—DELAYED APPEAL—WHEN PERMISSIBLE.
   Under the provisions of the judicature act dealing with appeals from justices' courts (3 Comp. Laws 1915, § 14408), the circuit courts are not given general discretion to allow appeals in any case after the expiration of five days, where, in their judgment, it would be equitable, but that discretion is limited to that class of cases in which appellant was prevented from appealing within five days by circumstances beyond his control.

2. SAME—SUFFICIENCY OF SHOWING—JURISDICTION.
   A showing by the garnishee defendant that its secretary wrote the justice a letter denying any liability to the principal defendant, but made no sworn disclosure, and

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did nothing further until after the judgment was entered and the time for appeal had expired, *held*, insufficient to confer jurisdiction on the circuit court to grant an appeal.

Error to Muskegon; Vanderwerp (John), J. Submitted April 28, 1922. (Docket No. 90.) Decided June 5, 1922.

Garnishment proceedings in justice's court by James Selby against Anna Brading, principal, and the Amazon Knitting Company, garnishee defendant. There was judgment for plaintiff, and the garnishee defendant appealed to the circuit court. Judgment for garnishee defendant. Plaintiff brings error. Reversed, and judgment entered for plaintiff.

George H. Cross, for appellant.

Cross, Foote & Sessions, for appellee.

Plaintiff brought suit in justice's court in the city of Muskegon against the principal defendant, Anna Brading, and recovered judgment August 6, 1921, for $125 and $3.75 costs, which judgment was not paid or appealed from. August 12th garnishee proceedings were instituted against Amazon Knitting Company, a corporation. It filed a sworn disclosure denying any liability to the principal defendant. On October 14th, another garnishee proceeding was instituted against the same garnishee defendant, and the garnishee summons was properly served. The secretary wrote the justice that the company did not owe its employee, the principal defendant, anything, but no sworn disclosure was filed, and the garnishee defendant did not appear on the return day of the garnishee summons. Pursuant to the statute (3 Comp. Laws 1915, § 14392) the case was adjourned three days to give the corporation opportunity to show cause, and no cause being shown and the

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garnishee defendant not appearing, the justice on the third secular day rendered judgment against the garnishee defendant for the amount of the judgment. No question of the regularity of these proceedings is raised. On November 4th, the secretary of the garnishee defendant was notified of the judgment by a deputy sheriff who held the execution thereon, the time for appeal having expired. Shortly thereafter application for leave to take a delayed appeal was filed, and upon a hearing was granted. Plaintiff's counsel denying that the circuit court had acquired jurisdiction declined to participate in the trial in the circuit, and properly saved for review here the question of the validity of the delayed appeal. Judgment was entered in the circuit for the garnishee defendant.

FELLOWS, C. J. (*after stating the facts*). In section 8 of the chapter of the judicature act dealing with appeals from justices' courts (3 Comp. Laws 1915, § 14408), it is provided:

"Appeals may be authorized by the circuit court, or by the circuit judge at chambers, after the expiration of five days, when the party making the appeal has been prevented from taking the same by circumstances not under his control." * * *

This re-enacts former provisions which have many times received the consideration of this court. The sole question in the instant case is whether this defendant has brought itself within the provisions of this statute. The affidavit of its secretary upon which the delayed appeal was granted details the first garnishee proceedings and the filing of the sworn disclosure therein, the service of the garnishee summons in the second proceedings on the 14th of October, 1921, sets up a copy of the letter to the justice stating that the company did not owe the principal defendant anything, which letter the affiant calls a disclosure but states that it was not sworn to, and then states:

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"This deponent further says that after the disclosure of October 14th was filed this deponent immediately dismissed the matter from his mind, supposing that it was entirely taken care of and that there was nothing further to be done."

The affidavit then recites that deponent's attention was not called to the matter again until the execution was presented to him by the deputy sheriff, that he then saw the justice and plaintiff's attorney but was unable to get relief from them, and that the company did not owe the principal defendant anything at the time the garnishee summons was served on him. To recapitulate: The showing was that upon the service of the garnishee summons the secretary wrote a letter to the justice denying liability to the principal defendant, and then dismissed the matter from his mind and did nothing further until after the judgment was entered and the time for appeal had expired.

In the early case of *Draper* v. *Tooker*, 16 Mich. 74, where this statute was under consideration, it was said by Mr. Justice CHRISTIANCY, speaking for the court:

"It is quite clear that the statute did not intend to give a general discretion to the circuit court to allow appeals in any case after the five days, where, in their judgment, it would be equitable, or when the party had made a mistake, or drawn an erroneous inference; but that by the restrictive language used, the intention was to confine that discretion to the class of cases in which the appellant had been prevented from appealing within the five days by circumstances beyond his control. The discretion is, therefore, confined to cases falling within this class."

This court has quite consistently followed the rule here announced. *Stanton* v. *Wayne Circuit Judge*, 126 Mich. 715; *Stock* v. *Wayne Circuit Judge*, 143 Mich. 339; *Graham* v. *Wayne Circuit Judge*, 143 Mich. 360; *Goldhamer* v. *Wayne Circuit Judge*, 107 Mich.

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259; *Anderson* v. *Wartenberg,* 196 Mich. 529; *Huddleston* v. *Charles Amos & Co.,* 180 Mich. 253; *Combs* v. *Saginaw Circuit Judge,* 99 Mich. 234; *Feldman* v. *Zimmerman,* 208 Mich. 240. In the case of *Combs* v. *Saginaw Circuit Judge, supra,* it was said:

"The section referred to provides that appeals may be allowed by the circuit court or a judge thereof at chambers, after the expiration of five days, when the party making the appeal has been prevented from taking the same by circumstances not under his control. The only ground for saying that the defendant in this case was prevented from taking his appeal is that the absence of the justice was an obstacle to his perfecting the appeal. But section 7006, How. Stat., provides that the affidavit and bond or recognizance, in case of the absence from his dwelling-house of the justice by whom the judgment was rendered, may be served on any member of his family of suitable age, and the costs and fees may be paid to such member of his family. It does not appear that the defendant could not have complied with this provision, and therefore it cannot be said that he was prevented by circumstances not under his control from taking the appeal. * * *

"This court has repeatedly held that the granting of permission for a dilatory appeal is not a matter of discretion, but that, to justify such an order, the party must bring himself within the terms of the statute. This we think the appellant failed to do in the present case."

Vincent v. *Bowes,* 78 Mich. 315, is cited to us as holding that the granting of such leave is discretionary. That case does so hold. It is the only case so holding which we have been able to find in the time at our disposal. In so holding it is out of line with the other decisions of this court. But the language there used was not necessary to decision and must be regarded as *obiter dictum* and not controlling.

This statute has been recognized as affording relief to those parties who have been prevented from taking

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an appeal seasonably by circumstances not under their control. Thus serious illness of a member of a party's family furnishes grounds for bringing the statute in use (*Braastad* v. *Mining Co.*, 54 Mich. 258); likewise reliance upon one's attorney (*Capwell* v. *Baxter*, 58 Mich. 571); reliance upon a co-defendant to perfect the appeal (*Potter* v. *Lapeer Circuit Judge*, 119 Mich. 522); want of notice and absence from the State (*Jackson* v. *Jackson*, 135 Mich. 549). But these cases would not justify us in sustaining the right to a delayed appeal in the instant case. Here the defendant was served with process. All it did in response to that process was to write a letter to the justice denying liability. If under these circumstances we hold that defendant has been prevented from taking the appeal by circumstances not under its control it is difficult to perceive under what circumstances a delayed appeal could be refused. We recognize that the garnishment statute affords a harsh remedy, but one who strictly follows its provisions is entitled to its benefits as well as other remedies. Defendant here is in no better position than would be any defendant served with process who thought he was unjustly sued and who wrote a letter to the justice denying liability and then took no further steps to protect his rights. He may have had a complete defense, but the justice's court was the place and the return day was the time to assert it. He can not utterly fail to protect his own rights and after it is too late to appeal from an adverse judgment claim that he has been prevented from taking the appeal by circumstances not under his control.

The circuit court did not acquire jurisdiction by these proceedings and its judgment must be reversed and that of the justice affirmed.

WIEST, MCDONALD, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

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JONES v. DETROIT TAXICAB & TRANSFER CO.

1. NEGLIGENCE—PERSONAL INJURIES—EVIDENCE—WITNESSES—RATE OF SPEED.

   In an action for personal injuries to an infant 4 years and 4 months old, caused by being struck by a taxicab upon a public street, a witness who had observed moving objects, had driven a horse and wagon for 12 years, had ridden in automobiles, had observed their speed and watched the speedometer, was competent to testify as to the rate of speed at which the taxicab was approaching, which he saw when it was 40 feet away.

2. SAME — EVIDENCE — AUTOMOBILES — LICENSE NUMBER — PRIMA FACIE OWNERSHIP PROVED BY CERTIFIED COPIES.

   Certified copies from the office of the secretary of State of the application for, and issuance to the defendant, as owner, of the distinctive number of the license plate upon the taxicab was sufficient to establish ownership *prima facie*.

3. SAME—WITNESSES—CROSS-EXAMINATION — CREDIBILITY OF WITNESS.

   Cross-examination of the driver of the taxicab, in which he admitted he had been discharged for overcharging customers but denied that there were other causes, *held*, not improper, since the questions asked affected the credibility of the witness and the examination was kept within reasonable bounds by the trial judge.

4. TRIAL — ARGUMENT OF COUNSEL — GOOD FAITH—COUNSEL MAY STATE WHAT HE BELIEVES TO BE THE LAW.

   Argument of counsel as to what he believes the law applicable to the case to be is not reversible error, although he may be mistaken, where the argument is made in good faith, since the court, in his charge to the jury, should correct the error, and truly state the law upon the point.

Error to Wayne; Dingeman (Harry J.), J. Sub-

On evidence as to speed of automobile, see note in 34 L. R. A. (N. S.) 778.

Making *prima facia* case of responsibility for negligence of driver of automobile by proof of defendant's ownership of car or employment of driver, see notes in 46 L. R. A. (N. S.) 1091; L. R. A. 1918D, 924.

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mitted April 11, 1922. (Docket No. 31.) Decided June 5, 1922.

Case by Hugh G. Jones, an infant, by his next friend, against the Detroit Taxicab & Transfer Company for personal injuries. Judgment for plaintiff. Defendant brings error. Affirmed.

A. W. Sempliner, for appellant.

Clarence P. Milligan, for appellee.

Plaintiff, 4 years and 4 months old, was struck by a taxicab in the street in front of his parents' home, No. 71 Marantette street, in the city of Detroit. He was carried into the house, hurried to a hospital, where he remained some time. He made a good recovery but the testimony tends to show that he will be permanently disfigured. Marantette street is 26 feet from curb to curb and is paved with asphalt. The place of the accident was 3 or 4 blocks from the Michigan Central depot. Plaintiff produced one witness to the accident, a Mr. Miller, a junk peddler, who assisted in extricating plaintiff from under the taxicab after the accident. He was upon the street in his peddling wagon drawn by one horse and gave testimony tending to show that there were no automobiles parked on the street, that he saw the taxicab coming for 40 feet, that it was running 20 to 25 miles an hour, that no horn was sounded, that the infant plaintiff was in the street in plain view and was run down by the taxicab. Defendant called the driver and his testimony tended to show that he was going less than the statutory rate of speed, that there was an automobile parked in the street and that the infant plaintiff came out from behind it when he was so close to him that it was impossible to avoid the accident although he did everything in his power so to do. Defendant also called an eyewitness to the acci-

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dent, a Mr. Brandt, who testified that there was an automobile parked on the street. In other regards his testimony tended to support that of the driver. The case was submitted to the jury in a charge not complained of. Plaintiff had verdict and judgment in the sum of $1,500.

FELLOWS, C. J. (*after stating the facts*). It is first insisted that the witness Miller had not qualified himself to testify on the subject of the speed of the taxicab and it is urged that, his testimony being the only testimony offered by the plaintiff on the subject of speed, there was no competent testimony that the taxicab was exceeding the statutory rate, and a verdict should have been directed for the defendant. Mr. Miller on his direct-examination testified that he had driven a horse and wagon for 12 years, had ridden in automobiles, once taking a trip from Detroit to Chicago, that he had a chance to observe how fast they were going, that he made the trip with two others, that they went "50 or 40 miles an hour," that he watched the speedometer, that he rides often with friends who have machines. In the early case of *Detroit, etc., R. Co.* v. *Van Steinburg*, 17 Mich. 99, it was said by Chief Justice COOLEY, speaking for the court:

"The point to which the attention of the witnesses was directed was the speed of a passing object. The motion of the train was to be compared to the motion of any other moving thing, with a view to obtaining the judgment of the witness as to its velocity. No question of science was involved, beyond what would have been, had the passing object been a man or a horse. It was not, therefore, a question for experts. Any intelligent man, who had been accustomed to observe moving objects, would be able to express an opinion of some value upon it, the first time he ever saw a train in motion. The opinion might not be so accurate and reliable as that of one who had been

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accustomed to observe, with time-piece in hand, the motion of an object of such size and momentum; but this would only go to the weight of the testimony, and not to its admissibility. Any man possessing a knowledge of time and of distances would be competent to express an opinion upon the subject."

See, also, *Guggenheim* v. *Railway Co.*, 66 Mich. 150; *Keating* v. *Railroad Co.*, 104 Mich. 418; *Line* v. *Railway Co.*, 143 Mich. 163. The witness had observed moving objects, for 12 years he had driven a horse, he had ridden in automobiles and had observed their speed. He saw the taxicab coming for 40 feet. While his cross-examination may have affected the credit to be given his testimony it did not render it inadmissible. The trial judge did not err in receiving the testimony nor in overruling defendant's motion for a directed verdict.

When the accident occurred plaintiff's father took the license number of the machine—128028. Upon the trial plaintiff by certified copies from the office of the secretary of State proved the application for and issuance to the defendant as owner of that distinctive number. This was sufficient to establish ownership *prima facie*. In *Hatter* v. *Dodge Bros.*, 202 Mich. 97, it was said by Justice STEERE, speaking for the court:

"Proof of the license number upon an automobile being driven upon a highway and of the person in whose name such distinctive number is registered as owner, *prima facie* identifies both vehicle and ownership."

Upon cross-examination of the driver he admitted that he had been discharged for overcharging customers but denied that he was discharged for other causes. It is claimed that this cross-examination was improper and constitutes reversible error. The questions asked affected the credibility of the witness and

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the trial judge kept the examination within reasonable bounds. We find no reversible error in the cross-examination of this witness.

Finally error is assigned on the argument of plaintiff's counsel. We have read the excerpts which are claimed to be prejudicial. They are not of an inflammatory character. Indeed, the objection most seriously urged to them is that plaintiff's counsel did not state the applicable law. There is nothing upon this record indicating that plaintiff's counsel was not acting in entire good faith. When so acting counsel may, both in stating his case in the first instance and in his argument of the case to the jury, state what he believes the law applicable to the case to be. *Fosdick* v. *Van Arsdale,* 74 Mich. 302; *People* v. *Smith,* 177 Mich. 358, and authorities there cited and considered. In the case of *People* v. *Jenness,* 5 Mich. 305, where it was contended that in the argument of the prosecuting attorney he erroneously stated the law and that this constituted reversible error, it is said:

"However erroneous this view of the law might be (and it was clearly so), yet, as it was a question of law for the court, and not for the jury, we do not think it could be treated as an error for which a verdict should be set aside, if the court, in his charge to the jury, should correct the error, and truly state the law upon the point. It is to the charge, and not to the argument, we are to look for the decision of such a question."

We find no reversible error upon the record and affirm the judgment.

WIEST, MCDONALD, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

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KERR *v.* McHENEY.

1. DEEDS—OLD AND ILLITERATE MAY DISPOSE OF PROPERTY.
The old as well as the young may dispose of their property as they see fit, the illiterate as well as the educated.

2. SAME—CANCELLATION OF INSTRUMENTS—COMPETENCY OF GRANTOR.
In a suit to set aside a deed of a farm by a father to defendant daughter, with whom he made his home, evidence *held*, insufficient to establish that grantor was incompetent to execute the deed.

3. SAME—TRUSTS—EVIDENCE — BURDEN OF PROOF — UNDUE INFLUENCE.
Evidence *held*, insufficient to establish undue influence, even if plaintiffs' contention is accepted that *quasi*-trust relations existed between grantor and defendant and the burden of proof is upon defendant to show that the transaction was in all respects fair.

4. ESTATES OF DECEDENTS—ACCOUNTING—EVIDENCE—SUFFICIENCY.
Evidence *held*, insufficient to establish that defendant daughter has any money in her hands belonging to her father's estate.

Appeal from Washtenaw; Sample (George W.), J. Submitted April 26, 1922. (Docket No. 139.) Decided June 5, 1922.

Bill by Hannah Kerr and Peter Morton against Maggie McHeney and another to set aside a deed. From a decree for plaintiffs, defendants appeal. Reversed and bill dismissed.

Cavanaugh & Burke (*Henry C. Bogle*, of counsel), for plaintiffs.

William Henry Gallagher, for defendants.

McDONALD, J. Questions of fact alone are involved

On undue influence in conveyance or transfer of property in consideration of support of the grantor or a third person, see note in 52 L. R. A. (N. S.) 476.

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in this case. As we reach a different conclusion than did the trial judge, we shall state the facts we are persuaded this record establishes. Peter Morton, Sr., was the owner of an 80-acre farm in Saline township, Washtenaw county. He had three children, the plaintiffs and defendant Maggie McHeney. Hannah was the oldest of the family. Until her marriage at the age of 17 she worked on the farm, on occasions doing a man's work. Peter was somewhat dissolute and untrustworthy. Maggie, the youngest of the family, when married, went to live in Detroit. Mrs. Morton died July 9, 1911. The following spring Mr. Morton rented the farm and went to live with Maggie in Detroit. He lived with her and she cared for him until his death May 4, 1919. Mr. Morton's farm was not far from Tecumseh and he frequently went there. Such law business as he had was done by Mr. Wood, an attorney living there and who had been following his profession since 1884. Before that Mr. Wood's father had done his business. He called on Mr. Wood occasionally for a visit when he had no business to transact. After going to live with his daughter Maggie, Mr. Morton, so long as his health permitted, made occasional visits to the farm, and when he went there he frequently went to the nearby towns, Saline, Clinton, and Tecumseh. In 1914, Mr. Morton had Mr. Wood prepare a will for him. In it he provided that Maggie should be reasonably and liberally paid for her services, and in addition gave her $200 or $300, and divided the balance of his property between his three children, the share of Peter being placed in trust. In 1916 he made another will making the same provision as to compensation to Maggie, slightly increased her specific bequest, and made the same division of the balance. In January of 1918, he made another will which contained the provision for compensating Maggie, increased her specific bequest sev-

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eral hundred dollars, and divided the balance between his children, but did not place Peter's share in trust. All these wills were drawn by Mr. Wood in his office at Tecumseh. In the fall of 1918, Mr. Morton sent for Mr. Wood to come to Detroit. On November 18th, Mr. Wood went there; he spent practically half a day with Mr. Morton. They visited about old times and Mr. Morton went over fully with Mr. Wood the disposition of his property and was fully advised by Mr. Wood. Mr. Morton was then in a crippled condition. He then well knew his condition and was apprehensive that he would continue a great care until his death. He looked to his daughter Maggie and to no one else for such care. He wanted to compensate her for the care she had rendered and would render in the future. All of this he communicated to Mr. Wood. By his direction Mr. Wood prepared the deed here assailed. It conveyed the farm to Maggie, reserving a life use. Mr. Wood also prepared a paper which was executed by Maggie acknowledging full payment for past services and agreeing to care for her father during the balance of his life, also agreeing to pay his burial expenses if he left insufficient funds, and agreeing to pay her brother and sister each $300 within a year after his death. This was made a lien on the premises. By Mr. Morton's direction the deed was recorded, and likewise by his direction the other paper was kept by Mr. Wood. Both instruments were witnessed by Mr. Wood and Mr. Morton's physician.

This deed is assailed on the usual grounds of mental incapacity and undue influence. There is some testimony coming from members of plaintiffs' families which would have some tendency to sustain plaintiffs' claim although it is of the most meagre sort. The overwhelming weight of the disinterested testimony both from plaintiffs' witnesses and those called by defendants establish his mental competency to execute

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the instrument here involved. Mr. Morton was not an educated man; he could neither read nor write. He was about 73 years old when the deed was executed. His physical condition required constant care and attention but it did not affect his mentality. The testimony of the doctor, of Mr. Wood, of neighbors in Detroit, of old neighbors who visited him and of others who knew and saw him is convincing to us that the instrument in question was not the product of an unsound mind. The old as well as the young may dispose of their property as they see fit, the illiterate as well as the educated. This property was the property of Mr. Morton and it was for him to give or to withhold as he saw fit. Plaintiffs have failed to establish the mental incompetency of the deceased.

We are also satisfied that the deed is not the product of undue influence. If we should accept the contention of plaintiffs' counsel that this case falls within the class of cases where the trust relation or *quasi*-trust relation is held to exist, and adopt the rule contended for by them, that the burden is on the defendants to show that the transaction was in all regards fair, a rule of doubtful application to the facts of this case, it would not benefit plaintiffs. Here the grantor had independent advice from his own attorney. He and his attorney went over the matter fully when no one else was present and after it had been decided just what should be done Maggie was called in and advised of the arrangement. She then said to her father:

"Father, anything you want to do with your property is all right with me, you can have a home here as long as you live whether I get a dollar for it or not."

She then left the room and Mr. Wood proceeded to prepare the papers. We are satisfied that there was no influence, due or undue, exercised over deceased to

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procure this deed, that it was freely made to compensate the only one of the children who seemed to be willing to furnish a home for deceased in his declining days.

There is some testimony in the record as to the amount of money Mr. Morton had at different times during the last six or eight years of his life. We think there are some duplications in plaintiffs' figures and that their claim of the amount of money he had is too high. He paid the taxes on the farm, bought grass seed for it, had doctor's bills and other personal expenses to pay, and we are not convinced that defendant Maggie has any of her father's money or that she has been paid for her care otherwise than by the deed.

The decree of the circuit court setting aside the deed will be reversed and one here entered dismissing the bill, with costs of both courts to defendant Maggie McHeney.

FELLOWS, C. J., and WIEST, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

QUINN *v.* BRADLEY.

NEGLIGENCE—AUTOMOBILES—DEATH — CONTRIBUTORY NEGLIGENCE—EVIDENCE—DIRECTED VERDICT.

In an action for the death of plaintiff's decedent by being struck by defendant's taxicab, testimony that decedent was struck while alighting from a street car or while still on the car preparing to alight, *held*, to preclude a

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directed verdict for defendant on the ground of decedent's contributory negligence, although said testimony was out of accord with all the other testimony in the case, since its weight was for the jury.

Error to Muskegon; Vanderwerp (John), J. Submitted April 21, 1922. (Docket No. 83.) Decided June 5, 1922.

Case by Agnes M. Quinn, administratrix of the estate of Leo J. Quinn, deceased, against Martha Eaton Bradley for the alleged negligent killing of plaintiff's decedent. Judgment for defendant on a directed verdict. Plaintiff brings error. Reversed.

James E. Sullivan (*Edward C. Farmer*, of counsel), for appellant.

Harris E. Galpin (*Joseph T. Riley*, of counsel), for appellee.

FELLOWS, C. J. July 5, 1920, on Lake street in the city of Muskegon, plaintiff's decedent was struck and instantly killed by a taxicab owned by defendant. The testimony unquestionably made a case of negligence on the part of the driver of defendant's taxicab. The testimony of the witnesses called by plaintiff tended to show that decedent boarded a street car at Lincoln avenue to go to Addison street, some 8 blocks distant. The car and trailer were both crowded and decedent rode on the step. When plaintiff rested her case the proofs had established that decedent had safely alighted from the car, getting off while the car was proceeding slowly, and had taken one or more steps toward the curb without looking to ascertain what traffic was approaching. Defendant's counsel moved for a directed verdict, a recess was had, the case was re-opened for further proof and a witness was called who testified to seeing the accident from the sidewalk. Speaking of decedent, he said:

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"He was getting off right straight from me. I was standing on the sidewalk and it looked as though he was—I didn't see him hit the ground at all. It just looked as though he let loose and the next I seen him he was rolling under the back end of the car.

"*Q.* That front end of the car was, in your opinion, just opposite the sidewalk on Addison street?

"*A.* Yes, sir, maybe two or three feet on towards the center of the street, but it wasn't any more than that.

"*Q.* Did you observe Mr. Quinn taking any step or stepping off the car?

"*A.* No, sir, I don't believe he did. I don't believe he even hit the pavement before he was hit. I believe that he was hit just at the time that he was leaving the step off of the street car."

The trial judge granted defendant's motion and directed a verdict for defendant on the ground of decedent's contributory negligence. In this we think there was error. The testimony above quoted took that question to the jury. If decedent was struck in mid air or while still on the step and when preparing to alight, it cannot be said as matter of law that he was guilty of contributory negligence. The credit to be given this testimony was for the jury. Even though it was out of accord with all the other testimony in the case and the overwhelming weight of the evidence opposed it, still that fact would not justify a directed verdict. *In re Cochrane's Estate,* 211 Mich. 370.

The judgment must be reversed with a new trial. Plaintiff will recover costs of this court.

WIEST, MCDONALD, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

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KUHLMAN *v.* KUHLMAN.

1. DEEDS—CANCELLATION OF INSTRUMENTS—ESCROWS—CONDITIONAL DELIVERY.

   In a suit by a father to set aside a deed conveying 80 acres of land to defendant son, evidence *held*, sufficient to justify the finding of the court below that the deed was placed in escrow with the condition that it became effective only in case plaintiff did not return safely from an extended visit to Chicago.

2. APPEAL AND ERROR — CHANCERY CASES ON APPEAL HEARD DE NOVO.

   Although the Supreme Court hears chancery cases *de novo*, upon appeal from the decree of the court below, where it is not persuaded that a different result upon the facts should have been reached, its decree will be affirmed.

Appeal from Ottawa; Cross (Orien S.), J. Submitted April 7, 1922. (Docket No. 43.) Decided June 5, 1922.

Bill by Henry C. Kuhlman against Hugo R. Kuhlman to set aside a deed. From a decree for plaintiff, defendant appeals. Affirmed

Leo C. Lillie, for plaintiff.

Charles E. Misner, for defendant.

FELLOWS, C. J. Plaintiff is the father of defendant. He has two other sons and a daughter. He owned land in Ottawa county and had property in Chicago. He is a tailor by trade. About 1908 he deeded to defendant 80 acres of his Ottawa county land, but retained other land including that involved in this suit. He gave defendant the personal property on the

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farm and he and his wife went to Chicago to live. In April, 1918, his wife died and shortly after that he came to live with defendant on the Ottawa county farm. In the spring of 1919 the plaintiff decided to return to Chicago to look after his property there. It is to be inferred that his stay in Chicago might be prolonged. On March 7th, he signed the deed in question which conveyed to defendant another 80 acres of the Ottawa county land. This deed was left in escrow with a Mr. Sherwood of the Grand Haven State Bank. The pivotal questions in the case revolve around the terms upon which the deed was deposited and these are purely questions of fact. Mr. Sherwood, as we understand the record, was deceased at the time the case was heard. The plaintiff's testimony was somewhat rambling and his conduct in court erratic although mental incompetency is not charged in the bill. The trial judge found upon the facts:

"It is evident from the testimony of both parties that the deed was to be effective only in case that the plaintiff did not return from Chicago and that if he did return that the deed would be subject to his direction and control. This understanding between the parties was not conveyed to the attorney who drafted the deed, but it is clear from the testimony of both parties that plaintiff reserved the right to call for the deed when he returned from the trip from Chicago, that it was to be effective to pass title only in case of his death before he returned from his trip to Chicago."

Portions of defendant's testimony sustain this finding although other portions tend to establish an absolute delivery in escrow without the power to recall and that the deed was executed pursuant to a long existing intent and agreement to give defendant this land. While we hear chancery cases *de novo* we are

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not persuaded that we should reach a different result upon the facts than did the trial judge. He heard and saw the witnesses and had superior opportunity to judge their credibility, a factor of prime importance in the instant case. We agree with his conclusions and affirm the decree. Plaintiff will recover costs of this court.

WIEST, MCDONALD, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

PEOPLE v. THRINE.

1. CRIMINAL LAW—COMPLAINT—SUFFICIENCY — ORDINANCES — ALLEGATION OF PLACE OF OFFENSE — JURISDICTION — JUSTICES OF PEACE.

   A complaint charging "that heretofore, to wit, on the 1st day of September, A. D. 1921, at the city of Battle Creek, in the county aforesaid, and for three months preceding that day, at the city of Battle Creek in said county, one N. was a disorderly person, by keeping a house resorted to for the purpose of prostitution and lewdness," in violation of a city ordinance, *held*, not open to the objection that it did not give the justice jurisdiction in that it did not allege that the house was located in Battle Creek.

2. SAME—RIGHT OF PROSECUTING OFFICERS TO DETERMINE APPLICABLE STATUTE.

   Prosecuting officers have the right to use their discretion in determining under which of applicable statutes or ordinances a prosecution shall be instituted.

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3. PROSTITUTES—DISORDERLY PERSONS—STATUTES.
Prostitutes are defined as disorderly persons by statute (2 Comp. Laws 1915, § 7774).

4. DISORDERLY HOUSES—PROSTITUTES—ORDINANCES—APPLICABILITY.
Proof that defendant kept a bawdy house in the city of Battle Creek justified her prosecution under an ordinance of that city entitled "An ordinance to prevent and suppress disorderly houses and assemblages and to punish disorderly persons," since a prostitute is a disorderly person; although she might have been prosecuted under another ordinance of said city entitled "An ordinance to suppress and prevent houses of ill-fame and to punish the keepers and inmates thereof."

5. CRIMINAL LAW—TRIAL—INSTRUCTIONS AS TO FAILURE OF DEFENDANT TO TAKE STAND NOT ERROR—PRESUMPTION OF GUILT.
In a prosecution under a city ordinance as a disorderly person, where defendant was not in court, it was not error for the trial judge, of his own motion, to instruct the jury that the presence in court of defendant was not necessary, and the fact that she had not taken the stand in her own behalf did not raise any presumption of guilt against her.

Exceptions before judgment from Calhoun; North (Walter H.), J. Submitted April 14, 1922. (Docket No. 132.) Decided June 5, 1922.

Nettie Thrine was convicted of violating a city ordinance. Affirmed.

James M. Powers (*Joseph L. Hooper*, of counsel), for appellant.

John A. Wagner, City Attorney, for the people.

FELLOWS, C. J. On September 1, 1921, defendant was arrested for violating an ordinance of the city of Battle Creek. She pleaded guilty and was sentenced by the justice of the peace to pay a fine of $50 and costs, and to be confined in the county jail for a period of 30 days. The following day she appealed from the

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judgment of the justice to the circuit court of Calhoun county where she was permitted to withdraw her plea of guilty and enter one of not guilty. In the circuit court the proceedings were assailed on numerous grounds. A trial there resulted in her conviction, and she brings the case here relying upon some, but not all, of the objections there urged. We shall consider those relied upon in their order.

1. The complaint contained the following language:

"That heretofore, to-wit, on the 1st day of September, A. D. 1921, at the city of Battle Creek, in the county aforesaid, and for three months preceding that day at the city of Battle Creek in said county, one Nettie Prine was a disorderly person, by keeping a house resorted to for the purpose of prostitution and lewdness." * * *

It is first urged that this complaint did not give the justice jurisdiction in that it did not allege that the offense was committed in the city of Battle Creek, the specific point being that it is not alleged that the house was located in Battle Creek. We think this is too narrow a construction of the language used. Adding to the words "keeping a house" the words "at the city of Battle Creek," or preceding them with the words "then and there" was unnecessary. In the case of *State* v. *Harris*, 106 N. C. 682 (11 S. E. 377), it was held (we quote from the syllabus):

"When each count in an indictment alleges in the beginning that 'on the 1st day of January, 1888, in said county of Granville,' the defendant, etc., this applies to the whole count, and is a sufficient allegation that the crime charged in said count was committed in the county of Granville, and it is needless to repeat it at the beginning of each sentence or paragraph in the same count."

In Joyce on Indictments, § 318, it is said:

"It has been said that if taking the indictment as a

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whole, a day is specified as to an issuable averment, the objection will not be fatal because the day is not repeated with every issuable fact; and that if time and place are stated in the beginning of a sentence and may be grammatically read as applying to facts subsequently averred they need not be again averred or referred to by the use of the words 'then and there.' So the omission of the words 'then and there' in a clause describing the uses of a tenement which it is charged is maintained as a nuisance has been held to be of no importance."

There is no merit in this objection.

2. The city of Battle Creek has an ordinance, approved August 21, 1883, entitled:

"An ordinance to suppress and prevent houses of ill-fame and to punish the keepers and inmates thereof."

It also has an ordinance, approved March 12, 1900, and later amended, entitled:

"An ordinance to prevent and suppress disorderly houses and assemblages and to punish disorderly persons."

Section 1 of this ordinance is as follows:

"Be it ordained by the common council of the city of Battle Creek, that it shall not be lawful for any person knowingly to permit or suffer any house, building or place owned or occupied by him to be a resort of noisy, boisterous or disorderly persons, nor permit or suffer to remain therein any noisy, boisterous or disorderly person."

Defendant was prosecuted under this ordinance. The proof showed beyond question that she kept a bawdy house at 15 Short street in the city of Battle Creek, that she kept prostitutes who there plied their trade. While not claiming that defendant could not be convicted under the ordinance of 1883, it is strenuously urged by counsel that she could not be convicted under the ordinance of 1900. This court has recognized the right of the prosecuting officers to use their

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discretion in determining under which of applicable statutes the prosecution shall be instituted. *People* v. *Mire*, 173 Mich. 357.

Under the terms of section 1 of the ordinance of 1900 the occupant of a house who knowingly permits "disorderly persons" to resort there, or permits or suffers "disorderly persons" to remain there violates its provisions. Prostitutes are disorderly persons. They are so defined by our statute. 2 Comp. Laws 1915, § 7774. The New York court in *People* v. *Miller*, 38 Hun (N. Y.), 82, tersely said:

"The keeper of a house of ill-fame is a disorderly person and his conduct tends to disturb the peace of the community where the brothel is located and it did not need legislation to declare him such."

In *Cheek* v. *Commonwealth*, 79 Ky. 359, it was said:

"A disorderly house, in its restricted sense, is a house in which people abide, or to which they resort, disturbing the repose of the neighborhood; but in its more enlarged sense it includes bawdy-houses, common gaming-houses, and places of like character, to which people promiscuously resort for purposes injurious to the public morals, or health, or convenience, or safety. Nor is it essential that there be any disorder or disturbance in the sense that it disturbs the public peace or the quiet of the neighborhood. It is enough that the acts there done are contrary to law and subversive of public morals, and the result is the same whether the unlawful acts are denounced by the common law or by statute."

In *State* v. *McGregor*, 41 N. H. 407, it was said:

"The nuisance consists in drawing together dissolute persons engaged in unlawful and injurious practices, thereby endangering the public peace and corrupting good morals. The gist of the offence is the keeping or managing such a house to the public detriment, and, under a general charge, particular instances may be proved. That notoriously reputed prostitutes and libertines were in the habit of frequenting the house

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during the time laid in the indictment, had a direct tendency to support the allegations of the indictment and establish the guilt of the defendant, if the house were managed or controlled by him at the time."

See, also, *State* v. *Williams*, 30 N. J. Law, 102; *Price* v. *State*, 96 Ala. 1 (11 South. 128). The court did not err in holding that the prosecution could be maintained under the ordinance of 1900.

3. The defendant did not take the stand. The trial judge of his own motion gave the jury the following instruction:

"In this case the defendant has not taken the witness stand in her own behalf. In fact, it is obvious to you, gentlemen, that she is not even here in court. Her presence here in court is not necessary, it being a trial for an alleged misdemeanor, and so far as her not having taken the witness stand as a witness in her own behalf, that does not raise any presumption of guilt against her. It is a right any defendant may exercise under our Constitution and does not in any way raise a presumption of guilt. You should pass upon her guilt or innocence in the light of the testimony given here in open court and decide it under the rules of law as the court has stated them to you."

The giving of this instruction *sua sponte* is assigned as error. This question is foreclosed in this jurisdiction. *People* v. *Provost*, 144 Mich. 17, followed in *People* v. *Murphy*, 145 Mich. 524. In the *Provost Case* the authorities from other jurisdictions were fully reviewed and the propriety of such instructions by the court of its own motion sustained.

The conviction will be affirmed.

WIEST, MCDONALD, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

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MARINE TRUST CO. OF BUFFALO *v.* RODEN.

1. ACTION—JUDICATURE ACT—JOINDER OF DEFENDANTS PERMISSIVE.
   The provisions of the judicature act (3 Comp. Laws 1915, § 12366) making lawful the joinder of defendants is permissive and not mandatory.

2. SAME—JOINDER OF ACTION.
   Causes of action arising out of entirely separate and distinct contracts need not be joined, although they are of such a character that a joinder would be permissible.

3. JUDGMENT—NEGOTIABLE INSTRUMENTS—ACTION AGAINST MAKER DOES NOT BAR ACTION AGAINST INDORSERS.
   Indorsers not being joint makers of a note under the negotiable instruments act (2 Comp. Laws 1915, § 6104), their contract is not the contract of the maker, nor is his contract their contract (section 6041), therefore an action against the maker does not bar a subsequent action against the indorsers, the liabilities of the parties being different.

Error to Kent; Perkins (Willis B.), J. Submitted April 6, 1922. (Docket No. 32.) Decided June 5, 1922.

Assumpsit by the Marine Trust Company of Buffalo against Michael Roden and others as indorsers on a promissory note. Judgment for plaintiff. Defendants bring error. Affirmed.

Smedley, Linsey & Shivel, for appellants.

Knappen, Uhl & Bryant, for appellee.

FELLOWS, C. J. On November 12, 1919, Crohon & Roden Co., Ltd., executed its promissory note to plaintiff in the sum of $40,000 payable three months after

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date. Before delivery, these defendants together with B. Crohon (now deceased), indorsed the note on the back thereof. Some payments were made on the note but a considerable sum remaining unpaid plaintiff brought suit in the circuit court of Kent county against Crohon & Roden Co., Ltd., and recovered judgment for the balance due. The affairs of Crohon & Roden Co., Ltd., were placed in the hands of a receiver by the Federal court about the time the judgment was rendered and plaintiff there filed a claim based on its judgment. Nothing has been collected on that judgment. This action is brought against the surviving indorsers, the paper having been properly protested. But one question is presented upon this record and that is whether this suit against the indorsers is barred by the suit against the company and the filing of that judgment as a claim in the receivership proceedings.

The provisions of the judicature act making lawful the joinder of defendants (3 Comp. Laws 1915, § 12366) is permissive and not mandatory. *Lorimer* v. *Wayne Circuit Judge*, 216 Mich. 587; and in 1 C. J. p. 1113, where the writer was considering the subject of splitting causes of action, it was said:

"Causes of action arising out of entirely separate and distinct contracts need not be joined, although they are of such a character that a joinder would be permissible." * * *

If the indorsement of this note does not make the indorsers joint makers of the note; if their contract is a separate and distinct contract; their liability a separate and distinct liability; the doctrine of splitting causes of action, of election, does not apply. The case most strongly relied upon by defendants' counsel is *McKinley* v. *Small*, 178 Mich. 555. That case involved a promissory note executed by 11 persons. The contract was a joint one and what was there said had

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reference to the case then before the court. Numerous decisions of this court handed down before the adoption of the negotiable instruments act (2 Comp. Laws 1915, § 6040 *et seq.*) will be found holding that the indorsers of a note before delivery are joint makers. But this rule has been changed by that act. But two recent cases need be cited to demonstrate this. In *Westinghouse Elec. & Manfg. Co.* v. *Hupp,* 211 Mich. 698, Mr. Justice STEERE, speaking for the court and having reference to the uniform negotiable instruments act, said:

"The bill to make uniform the law of negotiable instruments recommended by the commissioners on uniform State laws in their national conference has been adopted by Pennsylvania and Michigan as well as most other States. It is largely a codification of the generally prevailing law upon the subject as settled by legislation and interpretation, the controlling purpose being uniformity with as few changes in the various jurisdictions as were necessary to accomplish that purpose. It may be noted the act has changed the previous rule in this State as to an indorser before delivery which held him to be a joint maker."

He then quotes provisions of the act and continues:

"It is undisputed that by the terms of those notes the R. C. Hupp Corporation as maker was absolutely required to pay the same, and primarily liable. The Hupp brothers placed their signatures in blank on the back of the instruments before delivery. They were not otherwise parties to them, and were casual indorsers secondarily liable."

In *Whitney* v. *Chadsey,* 216 Mich. 604, Mr. Justice BIRD, speaking for the court, said:

"It appears that these notes were indorsed by defendant before delivery to Herrick, and the question is raised, but not strenuously insisted upon, that for this reason defendant was a joint maker and not entitled to notice. This was undoubtedly the rule in this State before the negotiable instruments act went into

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effect in 1905. *Weatherwax* v. *Paine*, 2 Mich. 555; Bunker on Negotiable Instruments, p. 120, and cases. But we are of opinion that the negotiable instruments act changed this rule. Section 65 of the act provides:

"'A person placing his signature upon an instrument, otherwise than as maker, drawer or acceptor is deemed to be an indorser, unless he clearly indicates by appropriate words his intention to be bound in some other capacity.' 2 Comp. Laws 1915, § 6104.

"Before the negotiable instruments act was promulgated the courts of the country were divided upon the question as to whether the indorser, under such circumstances, was liable as a joint maker. This rule appears to have been incorporated to clear up that question."

The indorsers not being joint makers of the note their contract is not the contract of the maker, nor is his contract their contract or the same as theirs. Section 2 of the negotiable instruments act (2 Comp. Laws 1915, § 6041) provides:

"The person 'primarily' liable on an instrument is the person who by the terms of the instrument is absolutely required to pay the same. All other parties are 'secondarily' liable."

While both contracts related to the same loan they were separate contracts, the liabilities of the parties were different and we find no difficulty in reaching the conclusion that an action against the maker upon his contract does not bar a subsequent action against the indorsers on their contract, that an action against the party "primarily" liable does not bar an action against the party "secondarily" liable.

The judgment will be affirmed.

WIEST, MCDONALD, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

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PEOPLE v. WILLIAMS.

1. CRIMINAL LAW—EVIDENCE—REPORT OF PSYCHOPATHIC CLINIC—MENTAL CONDITION OF ACCUSED.

   In a prosecution in the recorder's court of the city of Detroit for larceny from a store, where the defense was want of sufficient mental capacity to commit the crime charged, a report by the director of a psychopathic clinic connected with said court as to defendant's mentality, *held*, not admissible as substantive evidence of defendant's mental condition.

2. SAME—EVIDENCE—REBUTTAL—PRESUMPTION.

   Where two physicians had testified on behalf of defendant that her mentality was so defective that she was incapable of forming an intent to commit a crime, testimony in rebuttal by another physician was not open to the objection that it should have been offered by the people in making out the main case, since they had a right to proceed on the presumption that defendant had mental capacity until there was some testimony in the case to the contrary.

3. APPEAL AND ERROR—SUPREME COURT TAKES RECORD AS MADE IN COURT BELOW.

   The Supreme Court, on error, must take the record as made in the court below and pass upon the questions presented.

4. CRIMINAL LAW—TRIAL—ARGUMENT OF COUNSEL—COUNSEL MAY NOT SUBSTITUTE HIS OPINION FOR EXPERT'S.

   Although none of the testimony of expert alienists as to defendant's defective mentality was admissible because of failure to lay the proper foundation therefor, where said testimony was admitted without objection on the part of the prosecutor, it was reversible error for him, in argument to the jury, to urge his opinion as against that of the alienists.

5. SAME—EVIDENCE—EXPERT TESTIMONY—ADMISSIBILITY.

   Expert opinion evidence is not admissible unless the

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facts upon which the opinion was based are laid before the jury.

6. SAME—TRIAL—ARGUMENT OF COUNSEL.

Argument of the prosecutor that expert alienists, in coming into court and testifying as to defendant's mental condition, prostituted themselves, *held*, reversible error.

7. SAME—TRIAL—INSTRUCTIONS AS TO BURDEN OF PROOF.

The charge of the court upon the subject of the burden of showing the mental condition of defendant, *held*, somewhat confusing, which would have been avoided had the court given defendant's request to charge thereon.

Error to recorder's court of Detroit; Marsh (Pliny W.), J. Submitted April 14, 1922. (Docket No. 124.) Decided June 5, 1922.

Minnie Williams was convicted of larceny, and sentenced to imprisonment for not less than 2½ nor more than 5 years in the Detroit house of correction. Reversed.

Thomas L. Dalton (*Frederick P. Hempel*, of counsel), for appellant.

Merlin Wiley, Attorney General, *Paul W. Voorhies*, Prosecuting Attorney, and *Elton R. Nellis* and *Robert M. Toms*, Assistants Prosecuting Attorney, for the people.

WIEST, J. Defendant was convicted of the crime of larceny from a store in the daytime. While in a store she took two pairs of hose of the value of $4.20 from a counter, concealed the same about her person and walked out. The act was witnessed by the store detective, who followed defendant to the street and arrested her. The defense was want of sufficient mental capacity to commit the crime charged.

Connected with the recorder's court of Detroit is a psychopathic clinic with Dr. A. L. Jacoby as director, and when defendant was arrested her case was referred to Dr. Jacoby for examination and report.

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She was examined and the following report filed in the case:

"In intelligence she shows herself definitely defective, with a mental age of 10 years 6 months and an intelligence quotient of 65. There is also present in her case signs of the organic type of deterioration probably the result of excesses in her life of immorality.

"I do not believe that she is the type of case who can be self supporting, and that if at large she will resort to petty crime to obtain her self support. There seems to be insufficient evidence to warrant her commitment as insane, and if she were sent to an infirmary, in all probability she would leave there, so that control would be lost over her. I would therefore recommend for her a prison sentence in order to obtain for her the necessary custodial care."

At the trial and during the presentation of the people's case, counsel for defendant offered this report in evidence, and upon objection it was excluded, but later, and after Dr. Jacoby had given his testimony, it was admitted without objection. Defendant claims there was error in excluding the report when it was first offered. The report was not admissible as substantive evidence of defendant's mental condition.

The defendant called two alienists who had examined her and they gave testimony in substance that they had spent an hour questioning her about simple facts, and noted her answers, demeanor and expression, and one was of the opinion she had the mind of a child not over 7 years of age, and the other that her mentality was below that of one 10 years of age, and both expressed the opinion that she had no conception of property rights, had loss of memory, was incapable of forming an intent to commit a crime because unable to distinguish between right and wrong, and one stated she had no resistance of will.

Dr. Jacoby testified in rebuttal that his examination of defendant revealed a mental age of 10 years and 6

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months and a person with a mentality of 10 years and 6 months would be capable of forming a criminal intent with reference to the crime of larceny from a store in the daytime, and capable of distinguishing between right and wrong with reference to the crime of larceny. This testimony of Dr. Jacoby in rebuttal was objected to on the ground that it should have been offered by the people in making out the main case. There is no merit in this objection. Until there was some testimony in the case tending to show want of mental capacity to commit the crime the people had a right to proceed on the presumption that defendant had mental capacity.

Complaint is made of the closing argument of the prosecuting attorney relative to the testimony of the alienists. The record shows the following:

"They tell you she is insane. Now, I do not presume that any of you are alienists. I am not one myself, but I think it is a matter of common knowledge that insanity runs into degrees, and that the nature of insanity is variable. Some are specialists in one degree of insanity, or in one direction. I speak now with reference to alienists. I mean the person. It may be perfectly possible for any otherwise normal person to be afflicted with a degree of insanity on one particular subject. Now, these alienists in my mind, and I speak frankly—as far as I am concerned, prostitute themselves, when they come in here and divulge their knowledge in one specific direction.

"*Mr. Dalton:* Just a minute. Call the court.

"*Mr. Moll:* Your honor, I have remarked that the alienist who comes in here and divulges his knowledge in one particular direction, and takes an arbitrary position, prostitutes his knowledge, and my remark was objected to.

"*Mr. Dalton:* I would like to have it from the stenographer; when I made the objection I called for the court. I would like to have the sentence prior to that read.

(The statement read by the reporter.)

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"*Mr. Dalton:* I objected to that statement, your honor, and I ask that it be stricken out.

"*The Court:* You said the word 'divulge' their knowledge?

"*Mr. Moll:* From a partisan point of view.

"*Mr. Dalton:* There isn't any partisan point of view, Both alienists testified innumerable times for the people.

"*The Court:* Well, I think counsel is entitled to a certain degree of latitude in commenting on the credibility and weight to be given the testimony of a witness. Now, I think, that with the qualification the prosecutor has now made, that remark is perhaps admissible as comment on the testimony; taken with that qualification.

"*Mr. Dalton:* Qualification that they prostitute themselves?

"*The Court:* No; they speak from a partisan standpoint.

"*Mr. Dalton:* I will take an exception.

"*Mr. Moll:* They don't give you the basis for their opinions. They don't open up the whole field—

"*Mr. Dalton:* Now, I object to that, your honor.

"*Mr. Moll:*—for your understanding.

"*Mr. Dalton:* Just a minute, Mr. Moll. I greatly regret having to interpose an objection here to the argument of counsel, but when he goes outside the latitude, I think I have a right to protect my client. I interpose an objection to that.

"*Mr. Moll:* Your honor, I feel convinced that this is a specially important case that gives me latitude, and in commenting on the testimony of so-called expert witnesses.

"*The Court:* I think counsel have the right to discuss the testimony of witnesses, the credibility or weight to be given to it.

"*Mr. Dalton:* That is what he personally thinks. He is giving his experience.

"*Mr. Moll:* All right, let the judge judge. My opinion is no better than yours.

"*Mr. Dalton:* You were not sworn as to your opinion. I object to that.

"*Mr. Moll:* You qualify me as a trial judge.

"*The Court:* Proceed.

"*Mr. Moll:* They come in here and they tell you the

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results of one hour's investigation on the part of two alienists. They tell you that they—what they tell you is the result of a mental and physical examination. They don't tell you the tests applied for the purpose of the mental examination. They tell you, however, that they asked a few questions based on the life of the subject and from those questions they have arrived at the conclusion that she is insane. Now, tell you that she is insane and they have opened up that whole field of insanity, and what insight have they given you? Have they given any of the pros and cons? They give you in their opinion that she is insane, and they don't tell you in what direction she is insane. * * * They don't tell you whether or not that insanity takes on the form of moral perversion or propensity or any particular nature of crime, but they tell you she is insane, and they expect you from their wisdom to say that she is not capable of formulating a criminal intent to commit a crime of larceny. They treat you simply as cogs in the machine.

"*Mr. Dalton:* I object to that statement.

"*Mr. Moll:* They tell you in their wisdom—

"*Mr. Dalton:* Exception to that remark.

"*Mr. Moll:*—and they expect you to decide with reference to that case. It is for you to determine whether or not this defendant is capable of formulating the criminal intent. Now, you are going to be the sole judges of the proposition of whether or not Minnie Williams on that day in question had the mentality with which to formulate a criminal intent, and what these alienists, Ives, Polozker and Jacoby have told you is their opinion in each particular case, and their opinion is given you that you may determine through experts, and through the opinion of experts the question of mentality with reference to Minnie Williams. Now, you are the alienists in this case.

"*Mr. Dalton:* I object to that statement.

"*Mr. Moll:* You are going to determine just what her mental equipment was and whether or not that mental equipment was sufficient for her to formulate the intent to commit larceny. Now, I want to impress that point on you if I don't impress any other point. If she was mentally defective, it doesn't necessarily mean in my opinion—

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"*Mr. Dalton:* I object to his opinion being stated here.

"*The Court:* Proceed.

"*Mr. Moll:* If she was mentally defective it doesn't necessarily imply that she was not capable of formulating an intent to commit larceny. Now, unless her insanity—if you are convinced that she is insane or mentally defective—take this particular angle, it has no bearing on this case, because whether or not she is insane on another subject has no possible bearing on whether or not she can formulate a criminal intent to commit larceny. Now, I give you that as my opinion, and act as an alienist.

"*Mr. Dalton:* That is objected to.

"*Mr. Moll:* And I tell you that your opinion with reference to her insanity and with reference to this case only is the opinion that must be accepted. If it were not for that fact, the case would be decided solely on any alienist or professed alienist that the defense might seek to bring in here for the purpose of airing their views.

"*Mr. Dalton:* I take exception to that statement.

* * *

"*Mr. Moll:* Now, as I say, I don't feel that you have had the benefit of the entire knowledge of the two alienists introduced on the part of the defense. They have bitten a small bite of a very large subject.

"*Mr. Dalton:* Now, I object to that, your honor.

* * *

"*Mr. Moll:* The only point in the whole argument with which you are interested, from which you can possibly base your verdict, is the fact of her insanity with reference to her capability of formulating a criminal intent, and that intent with reference to the commission of the crime of larceny. Now, I don't think that the matter is properly raised or the testimony of alienists properly introduced as a matter of defense. It is more or less a science that has to do with the care and the treatment of patients or convicts, if you please, after they have been committed.

"*Mr. Dalton:* I take an exception to that statement. Just a moment. I would like to have a ruling on that.

"*The Court:* Well, I don't see that—the testimony of experts is of course admissible for the purpose of

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aiding and assisting a jury in arriving at a proper conclusion as to the elements in that case.

"*Mr. Moll:* I mean by my remarks, your honor—

"*Mr. Dalton:* I am just taking the remarks as he said them.

"*Mr. Moll:* You don't allow me to qualify it.

"*Mr. Dalton:* I don't need any qualification. I am protecting my client's interests, and I don't want any remarks against her that are prejudicial to my client. I am objecting to that, and I would like to have a ruling on that.

"*The Court:* I think there is a basis for objection in view of the fact that the remark might be subject to a double interpretation. If the conclusion arrived at from the statement was that that is the only purpose for which alienists would properly be used, of course that would not be proper here, but it equally would be interpreted the other way. Subject to interpretation as I have said, I think it would be a proper remark. However, I think the counsel might use a little more specific language.

"*Mr. Moll:* However, your honor, I don't wish to convey that meaning, but I say this whole subject as has been dwelt upon on the part of the defense as a part of the rebuttal in this case, has in my mind to do more or less with a new science which will be developed and not with any particular bearing on this case.

"*Mr. Dalton:* I object to that statement."

None of the testimony of the experts, including Dr. Jacoby, was admissible had the rules of evidence been observed. We must, however, take the record as made in the court below and pass upon the questions presented.

The prosecuting attorney should not have been allowed to urge his opinion to the jury, as against that of the alienists, and it was reversible error to permit him to do so over the objection of counsel for defendant.

It is strange that in a case involving the life and history of defendant relative to the deterioration of her mind, and her habits, character, morbid propensity

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to purloin goods and want of sense of right and wrong, there is not a word about her past, except a few statements of hearsay. Defendant was not a witness. The claimed departure of her mental power was not instantaneous, but, if true, the result of some cause and manifested through her acts and conduct for a considerable space of time, and necessarily open to observation and yet the record is barren of testimony giving the least insight into her past life. A timely objection by the prosecutor would have compelled the defense to go into such matters or abandon the defense made.

The argument of the prosecuting attorney was highly prejudicial and cannot be excused by anything in the record. His argument discloses that he was evidently aware of the rule excluding expert opinion evidence unless the facts upon which the opinion was based are laid before the jury, and yet he made no objection to the giving of such opinions by the alienists at the trial and did not bring out the facts on cross-examination, but waited until the closing argument and then urged the jury to pay no attention to the opinion evidence because the facts back of the opinions had not been given. If he had seasonably objected the defendant would have had a right and chance to comply with the rule and give the facts upon which the opinions rested. The testimony of the alienists being in the case it was reversible error for the prosecutor to urge the jury to reject the opinions of the alienists and take his opinion and to ask that this be done on the ground they had not been given the facts. It was a direct appeal to the jury to employ a rule of exclusion of testimony it was the duty of the prosecuting attorney to invoke when the opinion testimony was introduced in the case if he cared to have such rule applied.

In some States such expert opinion testimony is

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admissible without first giving the facts, leaving the facts to be brought out on cross-examination. *People* v. *Faber*, 199 N. Y. 256 (92 N. E. 674, 20 Ann. Cas. 879). But in this State in both civil and criminal cases we hold fast to the rule requiring the facts to be given before the opinion and thereby enable the jury to know the basis of the opinion and determine the true facts before accepting the opinion. *Beaubien* v. *Cicotte*, 12 Mich. 459; *Kempsey* v. *McGinniss*, 21 Mich. 123; *Van Deusen* v. *Newcomer*, 40 Mich. 90; *Hitchcock* v. *Burgett*, 38 Mich. 501; *People* v. *Brown*, 53 Mich. 531; *People* v. *Bowen*, 165 Mich. 231; *White* v. *Bailey*, 10 Mich. 155.

Permitting the opinions of the alienists to be given, based upon observation, examination and information obtained out of court, and undisclosed to the jury, usurped the province of the jury and lent peculiar force to the appeal made by the prosecutor to the jury. The court should have sharply rebuked the prosecutor for stating:

"Now, these alienists, in my mind, and I speak frankly, as far as I am concerned, prostitute themselves, when they come in here and divulge their knowledge in one specific direction."

No part of this statement was permissible. The sting in the statement lay in the charge that the alienists in coming into court and giving opinion evidence relative to the result of their examination of the defendant prostituted themselves, and apparently this escaped the attention of the trial judge, when he was informed of what had happened evidently during his absence, for the record shows that after the statement and objection thereto Mr. Dalton said: "Just a minute. Call the court." The trial judge missed the point of the objection and rested his ruling upon the least objectionable portion thereof. The ruling left all the error in the case. There should have gone

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forth an instruction, then and there, that it was not permissible for the jury to take the personal opinion of the prosecutor, and also that the alienists were not subject to the charge of prostituting themselves by coming in as witnesses and giving their opinion evidence relative to the mental condition of the accused.

We have examined the claimed error in the charge of the court to the jury. The charge upon the subject of the burden of showing the mental condition of the defendant was somewhat confusing and would not have been so had the court given defendant's 10th request to charge.

We have examined the other errors alleged and they disclose no reversible error.

For the reasons pointed out the conviction of defendant is reversed and a new trial granted.

FELLOWS, C. J., and MCDONALD, CLARK, BIRD, SHARPE, MOORE, and STEERE, JJ., concurred.

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ABANDONMENT—See COVENANTS (1).

ABSENCE OF RECORD—See CRIMINAL LAW (36).

ABSENT WITNESSES—See CRIMINAL LAW (3).

ABUSE OF DISCRETION—See CRIMINAL LAW (3, 4, 10, 24); DIVORCE (5).

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ACTION.

1. The provisions of the judicature act (3 Comp. Laws 1915, § 12366) making lawful the joinder of defendants is permissive and not mandatory. *Marine Trust Co. of Buffalo* v. *Roden*, 693.

2. Causes of action arising out of entirely separate and distinct contracts need not be joined, although they are of such a character that a joinder would be permissible. *Id.*

See MUNICIPAL CORPORATIONS (22-24); STATUTES (4).

ACTION AGAINST THIRD PARTY—See MASTER AND SERVANT (1, 21, 24).

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ADMISSIONS—See INTOXICATING LIQUORS (5, 7); MUNICIPAL CORPORATIONS (23); PLEADING (2).

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ADVERSE POSSESSION.

1. In a suit to set aside certain deeds and to quiet title to land, where plaintiff claimed that defendants and their grantor worked said land under an agreement with her deceased husband, and defendants claimed title by adverse possession, the findings of the trial court on the disputed facts in favor of plaintiff, *held*, to be supported by the record. *Seifferlein* v. *Foerster*, 180.

2. Permissive possession does not ripen into title by adverse possession; but possession to be adverse must be hostile in addition to being actual, continued, visible, notorious, and distinct, and it must be established by clear and cogent proof. *Id.*

3. Where the proofs establish that defendants' possession was not hostile, their claim of title by adverse possession must fail. *Id.*

4. Testimony by defendants' grantor that he worked the land in dispute under an arrangement with plaintiff's deceased husband was admissible where it was shown that knowledge of said arrangement was brought home to defendants. *Id.*

5. Tax receipts showing that plaintiff's husband paid the taxes on said land until his death, and that later plaintiff paid them, *held*, admissible for their bearing on the question of defendants' intention during those years to claim title. *Id.*

See TAXATION (2).

AFFIDAVITS—See CRIMINAL LAW (30); DISCOVERY (3).

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ALIENATION OF HOMESTEAD BY HUSBAND ALONE VOID—See HOMESTEADS (2).

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ALLEGATION OF PLACE OF OFFENSE—See CRIMINAL LAW (51).

AMENDMENTS—See CRIMINAL LAW (47, 48); EXECUTION; MUNICIPAL CORPORATIONS (6); QUO WARRANTO (2).

APPEAL AND ERROR.

1. Under Circuit Court Rule No. 65 review of the clerk's taxation of plaintiff's costs may be had only after the trial court has passed upon such action. *Burns* v. *Township of Van Buren*, 40.

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APPEAL AND ERROR—Continued.

2. Although the trial court erroneously instructed the jury that they could allow plaintiff, a married woman, damages for interference with her household duties, where no such claim was made by plaintiff, and the error is not reflected in the verdict, the case will not be reversed therefor. *Yarington* v. *Huck*, 100.

3. In an action for personal injuries, where a verdict was directed in favor of defendant, the Supreme Court will consider the evidence in the most favorable view possible upon the question of whether an issue was presented for the jury. *Wortman* v. *Detroit United Ry.*, 119.

4. Where, in a case tried before the court without a jury, no exceptions were filed to the findings of the court in compliance with Circuit Court Rule No. 45 and 3 Comp. Laws 1915, § 12587, and there is no assignment of error that the findings do not support the judgment or that they are against the weight of the evidence, the Supreme Court has no other duty than to affirm the judgment. *Murphy* v. *Bonewell*, 171.

5. The Supreme Court is not the trier of the facts in law cases brought before it for review, but, under 3 Comp. Laws 1915, § 12587, if satisfied that the findings of the trial judge are against the clear weight of the evidence, reversal is authorized. *Hamburger* v. *Bank of Detroit*, 173.

6. While the Supreme Court hears chancery cases *de novo*, and is not controlled by the views of the trial judge, his findings on disputed facts are not to be overlooked, and in close cases his views are very helpful. *Seifferlein* v. *Foerster*, 179.

7. Where testimony by defendants' agent, who was called as a witness by plaintiffs without announcing until later that he was called for cross-examination under the statute, was favorable to defendants, there was no reversible error in its reception. *Moynes* v. *Applebaum*, 198.

8. Since the questions of fact are for the jury, the Supreme Court will not reverse a case on the facts unless it appears that the trial judge was clearly wrong in refusing a new trial because the verdict was against the great weight of the evidence. *Sabin* v. *Southard*, 227.

9. In an action tried before the court without a jury, where there was no request for written findings of fact and law and none were filed, under the statute (3 Comp. Laws 1915, § 12586) and the rule (Circuit Court Rule No. 45), the record presents no question which the Supreme Court can review on a writ of error. *Robbins* v. *Simons Sales Co.*, 569.

10. Where plaintiff brought two actions against defendant in justice's court on an open account and defendant took a special appeal in each case, alleging as error in the

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APPEAL AND ERROR—Continued.

first that the court erred in denying his motion to dismiss for the reason that there was another action pending arising out of the same claim or demand between the same parties, and alleging as error in the second that the court erred in allowing costs against defendant contrary to the statute (3 Comp. Laws 1915, § 14217), the defendant was entitled, when the causes were reached in the circuit, to have the legal questions presented in the special appeals determined as matter of law, an appeal in this respect presenting the characteristics of a certiorari. *General Electrical Engineering Co.* v. *Brumm*, 571.

11. Where defendant, instead of calling the attention of the court to said questions and asking for a decision thereon, made a motion to dismiss the first case because of the pendency of the second one, he may not complain of the action of the trial judge in denying the motion and entering an order consolidating the two causes. *Id.*

12. Where defendant in the circuit court at no time challenged the right of plaintiff to maintain the second action for the reason that it was splitting its cause of action, the question as to whether plaintiff could lawfully bring two actions to recover its claim against defendant is not before the Supreme Court, on error to review a judgment for plaintiff. *Id.*

13. Said question could not be raised by motion to dismiss, since its disposition depended upon whether it was supported by the proof. *Id.* 572.

14. Where neither the policy issued by a fraternal insurance company nor the by-laws of the company appear in the record, and the court may not assume that it was issued pursuant to the provisions of the statute relating thereto (2 Comp. Laws 1915, § 9393), the Supreme Court is unable, on the record, to make a decree involving the rights which have accrued thereunder. *Altfather* v. *Bloom*, 582.

15. Where the trial court denied defendant's motion for a directed verdict without reserving decision thereon or submitting the case to the jury, and directed a verdict for plaintiff, defendant's remedy was by motion for new trial or review in the Supreme Court by writ of error. *Quinn* v. *New York Life Ins. Co.*, 650.

16. Although the Supreme Court hears chancery cases *de novo*, upon appeal from the decree of the court below, where it is not persuaded that a different result upon the facts should have been reached, its decree will be affirmed. *Kuhlman* v. *Kuhlman*, 685.

17. The Supreme Court, on error, must take the record as made in the court below and pass upon the questions presented. *People* v. *Williams*, 697.

See CRIMINAL LAW (5, 8, 13, 19, 25); JUSTICES OF THE PEACE (4); MASTER AND SERVANT (4); MUNICIPAL CORPORATIONS (5); PLEADING (2, 3); SALES (7); TRIAL (11).

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APPEAL FROM JUSTICE'S COURT—See JUSTICES OF THE PEACE (2).

APPENDICITIS—See MASTER AND SERVANT (5-7).

APPROVAL OF CROSSING BY PUBLIC UTILITIES COMMISSION—See RAILROADS (1-5).

ARBITRATION AND AWARD.

1. Where a lease provided that in case the parties thereto were unable to agree upon the rent to be paid, "then each of said parties shall select one arbitrator, and the two arbitrators so selected shall select a third arbitrator, and the three arbitrators so selected shall fix and determine the rent to be paid," the finding of the arbitrators to be final and binding upon the parties, an award concurred in by two of the arbitrators only was not valid, since the language of the lease clearly provided for an award by three arbitrators. *Flint P. Smith Bldg. Co.* v. *Industrial Savings Bank*, 374.

2. On appeal by the lessee from the decree of the court below fixing the rent at $9,000 a year, its contention that, even if the award of the two arbitrators fixing the rent at $6,000 a year was not binding on the parties, the decree should have fixed the rent in accordance with that award, cannot be sustained, where the amount fixed in the decree is justified by the record. *Id.*

See INSURANCE (3-5, 11-13); STATUTES (1).

ARGUMENT OF COUNSEL—See CRIMINAL LAW (2, 25, 40, 41, 56, 58); INTOXICATING LIQUORS (4); TRIAL (13).

ARSON—See CRIMINAL LAW (19-26).

ASSAULT WITH INTENT TO RAPE—See CRIMINAL LAW (38, 42).

ASSIGNMENT OF ERROR—See APPEAL AND ERROR (4).

ASSIGNMENTS—See VENDOR AND PURCHASER (10).

ASSUMED NAMES—See CORPORATIONS (1).

ASSUMPSIT.

In an action under the common counts for money had and received, the trial court was in error in directing a verdict for defendant on the ground that plaintiff could not recover because the agreement under which he paid the money to defendant was void, since the common counts in assumpsit are equitable in their nature and will support a recovery in such case. *Kuchenmeister* v. *Dusza*, 497.

ASSUMPTION—See APPEAL AND ERROR (14).

ASSUMPTION OF RISK—See MASTER AND SERVANT (20).

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ATTORNEY AND CLIENT.

Where defendants failed to furnish a merchantable title to attorneys employed by them to secure a loan, they were excused from making or obtaining the loan, and, therefore, could not be held for any damages to defendants arising out of the failure to obtain the loan. *McCulloch* v. *Von Zellen*, 278.

See EVIDENCE (2); MASTER AND SERVANT (3).

AUTHORITY OF PRESIDENT TO CONTRACT—See CORPORATIONS (4).

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AUTOMOBILES—See HOMICIDE (4); NEGLIGENCE (5-9, 12-15).

AUTOPSY—See MASTER AND SERVANT (15).

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AWARD OF APPRAISERS—See INSURANCE (3-5).

BANKS AND BANKING.

1. In an action against a bank for the breach of a contract to pay out money only on checks signed and countersigned according to agreement, the finding of the court in favor of plaintiff, *held*, justified by the record. *Hamburger* v. *Bank of Detroit*, 173.

2. The burden of proof being upon defendant to establish its claim that plaintiff had accepted another as her debtor, and should apply certain moneys collected by her upon the transaction in question, the finding of the court in favor of plaintiff, *held*, not manifestly against the clear weight of the evidence. *Id.*

3. Where plaintiff made a special deposit with defendant bank in the name of E. Company, under an agreement that the money should be paid out only on checks signed by E. and countersigned by H., payment of the money on checks signed by E. alone, resulting in loss to plaintiff, *held*, to authorize an action by plaintiff. *Id.*

4. Plaintiff and defendant being the contracting parties, in an action on the breach of the contract E. Company was not a necessary party. *Id.*

See CRIMINAL LAW (11, 12).

BELIEF AS TO AGE OF CONSENT NO DEFENSE—See RAPE (3).

BENEFICIAL ASSOCIATIONS—See APPEAL AND ERROR (14).

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BILLS AND NOTES—See JUDGMENT (9).

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BREACH OF CONTRACT—See BANKS AND BANKING (3, 4); CONTRACTS; EQUITY.

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BURGLARY—See CRIMINAL LAW (33).

CANCELLATION OF INSTRUMENTS.

1. On a bill by a mother to set aside a deed from her to her son, evidence *held*, insufficient to support the allegations of the bill that defendant, who was only 16 years of age at the time the conveyance was made, importuned plaintiff to execute the deed or promised as a consideration therefor to support and maintain plaintiff during the remainder of her life. *Geary* v. *Geary*, 432.

2. Where the conveyance was voluntarily made, and defendant has improved the property to the amount of $2,000, of which plaintiff has the use, and defendant is under no greater legal obligation to support plaintiff, who is 87 years of age, than any of her other children, a decree will be entered in this court providing that the title remain in defendant but that he pay taxes and insurance and also pay plaintiff $100 per year during her life and $100 toward the expenses of her burial. *Id.* 433.

3. Where the grantee in a deed to a lot claimed by plaintiff to have been deeded by him to the grantor as security merely was not a party to the suit to set said deed aside, his interest in said lot cannot be adjudicated. *Altfather* v. *Bloom*, 582.

See DEEDS; FRAUD (5-8); HOMESTEADS (1).

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CARRIERS.

A passenger upon a street car must exercise a degree of care commensurate with the obvious dangers, or such as are within the comprehension of persons of ordinary foresight and prudence. *Kutchai* v. *Moreton*, 242.

See MUNICIPAL CORPORATIONS (7, 11).

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COMMON CARRIERS—See CARRIERS.

COMMON COUNTS EQUITABLE IN NATURE—See ASSUMPSIT.

COMPETENCY—See DEEDS (3, 6); INSANE PERSONS.

COMPLAINT—See CRIMINAL LAW (51).

COMPROMISE AND SETTLEMENT.

1. Settlement of family difficulties or controversies arising out of the distribution of estates is favored both at law and in equity, if at all reasonable and entered into understandingly. *Baas* v. *Zinke*, 552.
2. The termination of the controversy or a promise to forbear the contest of a will is a valid and sufficient consideration for such an agreement. *Id.*
3. Such a settlement will, however, be set aside where there is affirmative proof that it was procured by fraud. *Id.*

CONDITION—See PRINCIPAL AND SURETY.

CONDITIONAL DELIVERY—See DEEDS (8).

CONDUCT OF COUNSEL—See TRIAL (8, 10, 11).

CONDUCT OF PROSECUTOR—See CRIMINAL LAW (20, 39).

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CONJECTURE—See INSURANCE (10); MASTER AND SERVANT (15).

CONSENT NO DEFENSE IN STATUTORY RAPE—See RAPE (2).

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CONSTRUCTION OF CONTRACT—See CONTRACTS (2); MASTER AND SERVANT (29).

CONSTRUCTION OF DEED—See DEEDS (4).

CONSTRUCTION OF STATUTE—See CRIMINAL LAW (31); RAILROADS (1-5); STATUTES.

CONSTRUCTION OF WILL—See WILLS (4).

CONSTRUCTIVE NOTICE—See CUSTOMS AND USAGES; MUNICIPAL CORPORATIONS (4).

CONTEMPLATED NUISANCE—See NUISANCES.

CONTINGENT REMAINDER—See DEEDS (4).

CONTINUANCE—See CRIMINAL LAW (3, 9, 10).

CONTRACTS.

1. In a suit by the owners of a building against the contractor for an accounting and to enjoin interference with the completion of the building by the plaintiffs, evidence *held*, sufficient to sustain the finding of the court below that defendant breached the contract. *Becker* v. *Lincoln Building Co.*, 79.

2. Where the provisions of a building code were made part of the contract the parties were bound thereby, and the fact that the code was afterwards declared unconstitutional is immaterial, since the parties by appropriate reference might make an invalid code or any other paper a part of the contract. *Id.* 80.

3. Where plaintiffs agreed to deed to defendant the lot upon which the building was to be erected by defendant, and then purchase it back on a contract, but the bank refused to loan defendant money on said deed after it was executed, holding it to be only a mortgage, and in accordance with a new agreement, and in order to enable defendant to borrow the necessary money, plaintiffs executed a mortgage to the bank for $5,000 with directions to pay the same from time to time to defendant, upon which it had received $3,000, it cannot be said that what was done by plaintiffs amounted to a breach of the contract, justifying defendant's refusal to complete the building. *Id.*

4. Where plaintiff had a lease with defendant with option of renewal for five years, and defendant refused to renew,

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CONTRACTS—Continued.

plaintiff's remedy was an action at law for the breach of the contract and not a bill in equity asking solely for damages. *Stern Co.* v. *Friedman*, 258.

See BANKS AND BANKING; CANCELLATION OF INSTRUMENTS; COMPROMISE AND SETTLEMENT (2); CORPORATIONS (1); DEEDS (2); EQUITY; FRAUD (8); INSURANCE (4); MASTER AND SERVANT (29); MISTAKE; PARTNERSHIP; SALES (11); TRIAL (3).

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CONVEYANCES—See DISCOVERY (1).

CORPORATIONS.

1. Plaintiff, having contracted with defendant in her own name, was not doing business under an assumed name, and therefore is not prevented from recovering for breach of the contract by reason of her failure to comply with the statutes in regard to doing business under an assumed name (2 Comp. Laws 1915, § 6349 *et seq.*, as amended by Act No. 263, Pub. Acts 1919; 2 Comp. Laws 1915, § 6354 *et seq.*). *Hamburger* v. *Bank of Detroit*, 173.

2. In the absence of statutory regulation, a corporation organized not for pecuniary profit may make any reasonable regulation respecting the qualifications of its officers and members. *Workers Educational Ass'n* v. *Renner*, 302.

3. Where the only restrictions respecting the qualifications of officers and members of corporations organized not for profit under Act No. 171, Pub. Acts 1903 (2 Comp. Laws 1915, § 9054 *et seq.*), permissible under section 2 of said act, were limited to requiring membership in good standing in any fraternal, religious, or beneficiary order, a provision in the by-laws of a corporation organized under said act restricting the membership of its board of directors and the active membership of its society to those who were members of the Socialist party, a political party, is void. *Id.*

4. The question as to whether the president of defendant corporation had authority to make a three-year contract of employment with plaintiff, *held*, under the evidence, properly submitted to the jury. *Loew* v. *Hayes Manfg. Co.*, 595.

CORPUS DELICTI—See HOMICIDE (2).

CORRESPONDENCE—See EVIDENCE (4, 5).

COSTS—See APPEAL AND ERROR (1); MUNICIPAL CORPORATIONS (19).

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COUNSEL MAY NOT SUBSTITUTE HIS OPINION FOR EXPERT'S—See CRIMINAL LAW (56).

COURT RULES—See APPEAL AND ERROR (1, 4, 9); DISCOVERY (3); PLEADING (1).

COVENANT AGAINST SUBLETTING—See LANDLORD AND TENANT.

COVENANT FOR POSSESSION—See VENDOR AND PURCHASER (3, 4).

COVENANTS.

1. In a subdivision on which there were building restrictions, the change of the location of an alley and a readjustment of the affected lots without any other alteration, *held*, not to amount to an abandonment of the building restrictions. *Goodlove* v. *Hamburger*, 156.
2. A gasoline and oil service station is within the permissive restriction allowing the erection of "mercantile buildings" on a subdivision. *Id.*
3. In a suit by property owners to enjoin the violation of building restrictions on a subdivision, where said restrictions limit the erection of "mercantile buildings" to not less than two stories in height, the fact that defendants' proposed service station, as planned, would look better one-story than two-stories high, *held*, not to entitle them to violate said restrictions against plaintiffs' appeal to the courts for their enforcement. *Id.*
4. A restriction applicable to all the lots in a subdivision that "Said lot shall not be occupied by a colored person," *held*, not void as contravening the provisions of the 13th and 14th Amendments to the Constitution of the United States, or as contrary to public policy. *Parmalee* v. *Morris*, 625.

CREDIBILITY OF WITNESS—See NEGLIGENCE (14); WITNESSES (1).

CREDIT TO BE GIVEN MEDICAL TESTIMONY FOR THE JURY—See EVIDENCE (7).

CRIMINAL INTENT—See CRIMINAL LAW (46).

CRIMINAL LAW.

1. In a prosecution under 3 Comp. Laws 1915, § 15483, for disturbing the peace, where the evidence failed to show any "disturbance or contention," defendant's motion for a directed verdict of "not guilty" should have been granted. *People* v. *O'Keefe*, 1.
2. While, in a criminal prosecution, the prosecutor, in his argument to the jury, has the right to draw all reasonable inferences from the proofs submitted which tend to show guilt of the offense charged, he has no right to infer or challenge the attention of the jury to the fact that de-

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CRIMINAL LAW—Continued.

fendant was committing a crime with which he was not charged. *Id.*

3. The granting or refusing of applications for continuance being within the discretion of the trial court, refusal to grant a continuance for absent witnesses, in a prosecution for violating the liquor law, will not be reviewed by the Supreme Court in the absence of a showing of abuse of discretion. *People* v. *Burby*, 46.

4. Where great latitude in the cross-examination of a witness was allowed, and counsel took no exception to the ruling of the court limiting same, no abuse of discretion or harmful error is shown. *People* v. *Garvey*, 49.

5. An assignment of error based on permitting leading questions without calling attention to any particular question, counsel saying "A brief survey of the record shows the type of questions put to these witnesses," *held*, too vague to be considered. *Id.*

6. Error in not limiting rebuttal proof, *held*, not shown by the record, where the testimony about which complaint is made was limited to the period of time and to the situation about which his counsel had examined defendant in great detail. *Id.*

7. In a prosecution for violating the liquor law, conflicting testimony *held*, to present a question for the jury. *Id.*

8. In a prosecution for larceny by trick, conviction cannot be sustained where the record fails to locate the place of the crime within the jurisdiction of the trial court. *People* v. *LeBeau*, 70.

9. The granting of a motion for leave to indorse the names of additional witnesses on the information, and denial of defendant's motion for continuance of the case to allow opportunity to investigate the testimony of the newly indorsed witnesses, *held*, within the discretion of the trial court. *People* v. *Crawford*, 125.

10. Where six days' notice of the motion to indorse was given defendant's counsel, and of the three such witnesses sworn, the testimony of two was stricken from the record, and the only one whose testimony remained in the case was called by defendant for examination under the statute, it cannot be said that defendant was surprised, or that there was abuse of discretion in denying defendant's motion for a continuance. *Id.*

11. In a prosecution of the cashier of a bank for embezzling funds of the bank under 2 Comp. Laws 1915, § 8027, evidence that defendant credited to a firm of which he was a member the amount of two certificates of deposit which the maker of a note to the bank paid to him for the purpose of paying the note before it came due, which he was informed was in the hands of another bank as collateral, and therefore not surrendered to him, and which

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CRIMINAL LAW—Continued.

was carried on the books of the bank as a live asset, even after it was returned, *held*, sufficient to justify conviction; defendant's contention that he acted merely as agent of the maker in accepting the money to pay the note when it was returned being untenable. *Id.*

12. Proof of similar transactions to show intent is competent in a criminal prosecution of a cashier on a charge of embezzling from the bank. *Id.* 126.

13. An instruction that "the law presumes that every man intends the consequences of his own act, and if knowingly and intentionally committed cannot be excused on the ground of innocent intent," *held*, when read in connection with the charge as an entirety, not misleading, although standing alone it might be questionable. *Id.*

14. In a prosecution for murder, where the question as to whether defendant's confessions were made under duress, as claimed by him, or voluntarily, as claimed by the officers and others, was properly submitted to the jury, it was not error to receive them; their weight being for the jury. *People* v. *Best*, 141.

15. Testimony that defendant told witness that after the murder he went to the river, washed his hands, dried them on deceased's handkerchief, that he then threw the handkerchief into the river, and that witness later found a handkerchief on the bank of the river, *held*, properly admitted, with the handkerchief, although it was not identified as belonging to deceased. *Id.*

16. Complaint that the charge was argumentative, that the trial judge singled out the witnesses by name and gave undue emphasis to the testimony of the witnesses for the people, *held*, not reversible error. *Id.* 142.

17. An instruction not denying to accused the benefit of good reputation, but instructing the jury that, if the evidence was convincing beyond a reasonable doubt, it was their duty to convict notwithstanding the good reputation, *held*, not reversible error. *Id.*

18. Evidence reviewed, and defendant's conviction *held*, under the record, not to amount to a miscarriage of justice. *Id.*

19. In a prosecution for arson in burning a competitor's store where defendant was a witness in his own behalf, cross-examination with reference to a chattel mortgage, the materiality of which is not apparent, *held*, not reversible error, although it might with propriety have been omitted. *People* v. *Nemer*, 163.

20. Where defendant had given evasive answers to the prosecutor's questions, the statement of the prosecutor, after obtaining a direct answer, "Yes. You would like to have them believe that all right. I consider that a distinct victory," *held*, not reversible error. *Id.*

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CRIMINAL LAW—Continued.

21. While the prosecuting attorney stands in a somewhat different position than private counsel, the duty being cast upon him of seeing that defendant has a fair trial, yet he is not required to be supine and is entitled to display a reasonable amount of vigor in the trial of a case so long as he does not transgress the rules of conduct required of a public officer in his position. *Id.*

22. Where a character witness for defendant, on cross-examination, had stated that he had heard people say that defendant was a crook, refusal to permit him, on redirect-examination, to answer the question "Did you ever hear anything stated upon authority that would back that assertion," *held*, proper; since the question as to whether those who spoke ill of defendant had any foundation in fact for their views was a collateral issue. *Id.*

23. The answer of a character witness, based on his personal dealings with defendant rather than on what other people said of him, *held*, properly stricken out; since reputation is based on "what people say of a man." *Id.*

24. It being within the discretion of the trial judge to limit the number of character witnesses, in the trial of one accused of arson it was not an abuse of discretion to limit the number to six. *Id.* 164.

25. An assignment of error attacking the argument of the prosecutor, based on a statement by the trial judge in his charge to the jury that, "the arguments of counsel have been full and fair," *held*, without merit, if prosecutor's argument may be thus attacked. *Id.*

26. In a prosecution for arson, where there was testimony that defendant either set the fire himself or procured another to do it, an instruction that "if a person has guilty knowledge of a crime or aids and abets in that crime, but is not an active participant, he becomes a principal in the crime and can be found guilty," *held*, not misleading as giving the jury to understand that defendant was guilty if he knew that the fire was going to be set. *Id.*

27. In a prosecution for robbery while armed, where defendant claimed he was not at the place of the robbery when the crime was committed, it was not reversible error for the court to fail to give instructions relative to such defense, in the absence of any request therefor, since it is within the common intelligence of jurors, without being told, that, if accused was at another place at the time of the robbery, he was not the robber. *People* v. *Genther*, 289.

28. The charge of the court, *held*, to fairly present to the jury the question of defendant's participation in the robbery. *Id.*

29. Where the robbery took place in a store, in the evening with all the lights on, and defendant was identified, five hours later, by the victim of the robbery, as the robber

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CRIMINAL LAW—Continued.

who went through his pockets and took his money, it cannot be said that the verdict of guilty was against the great weight of the evidence. *Id.*

30. Affidavits by two citizens in support of a motion for a new trial, stating deponents' belief that all of the citizens of a city of about a million inhabitants were prejudiced against persons accused of the crime of robbery while armed, and believed any person so accused to be guilty unless his innocence were established, and that any citizen acting upon the jury would not render a verdict in a fair and unbiased manner, *held*, too general to impeach the verdict of the jury. *Id.*

31. In a prosecution for violating the act relating to the registration of motor vehicles (1 Comp. Laws 1915, § 4797 *et seq.*, as amended by Act No. 383, Pub. Acts 1919), evidence that defendant was driving on the public highways a motor truck employed in the private business of his employer, an automobile manufacturer, while displaying thereon the distinctive license number of said employer as a manufacturer instead of a separate license number assigned by the secretary of State, as required by said statute, *held*, sufficient to sustain his conviction. *People* v. *Wirth*, 493.

32. Self-serving statements made by or for the accused out of court, explaining suspicious circumstances, may be proved against him, and their falsity may be shown; the fact of their falsity admitting them as indicating an attempt to explain away incriminating circumstances by falsehoods. *People* v. *Minchella*, 517.

33. In a prosecution for burglary, a conversation between defendant and the police justice, in which defendant claimed that he could not have been at the scene of the crime at the time charged because he was in Detroit that day and voted, and that he finally admitted to the judge that he was lying, *held*, properly admitted. *Id.* 518.

34. The admissibility of said self-serving statement, *held*, not to depend upon its falsity. *Id.*

35. The fact that defendant did not take the stand in his own behalf would not make said statement inadmissible. *Id.*

36. Testimony by the sheriff that he had examined the poll lists at the precinct in Detroit where defendant stated he had voted on the day in question, and that the records did not show that defendant had voted as he represented, *held*, not open to the objection that said testimony was inadmissible as parol testimony of the contents of a public record, since the witness did not testify as to the contents of a record but of the want of any record. *Id.*

37. Although the testimony against defendant was largely circumstantial, it is *held*, sufficient to justify the trial court in refusing to direct a verdict in his favor. *Id.*

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CRIMINAL LAW—Continued.

38. In a prosecution for assault with intent to commit rape, testimony that on the day of the commission of the offense charged defendant attempted to fuss with or take advantage of a young girl, *held*, inadmissible. *People* v. *Hunter*, 525.

39. The action of the prosecutor in asking a witness, after she had testified that she knew defendant and that he had dinner at her home on the day in question, whether anything occurred that day with reference to her daughter, *held*, reversible error, although the question was not answered, since the question was well calculated to, and probably did, prejudice the defendant in the minds of the jury. *Id.*

40. Where defendant had testified to being with certain persons on the day in question, comment by the prosecutor, in his argument to the jury, on defendant's failure to produce said persons as witnesses to corroborate his story, *held*, not error. *Id.*

41. The provisions of the statute (3 Comp. Laws 1915, § 12552) protecting defendant from comment or criticism for not taking the witness stand in his own behalf is not extended to other witnesses who may know facts which would be helpful to defendant in making his defense, and his failure to produce them, if competent and within reach, is properly the subject of comment by the prosecutor. *Id.* 526.

42. In a prosecution for attempted rape, the action of the prosecutor in calling defendant's attention to a paper containing a statement made by his wife and asking him if he did not make the admissions to her contained therein, was reversible error under 3 Comp. Laws 1915, § 12555, providing that neither spouse may testify as to any communication made by one to the other without the consent of both, since the prosecutor's action was but an attempt to get before the jury in an indirect way testimony made incompetent by the statute. *People* v. *Salisbury*, 529.

43. Evidence as to defendant's guilt, *held*, sufficient to present an issue of fact for the jury. *Id.* 530.

44. Modification by the court of a requested instruction as to good reputation to make it more applicable to the testimony in the case and the claims of defendant, *held*, not error. *Id.*

45. A defendant in a criminal case may not be cross-examined as to confidential communications made by him to his wife relative to the charge against him. *Id.*

46. As a general rule, upon a trial for felony the prosecution may not introduce evidence tending to prove that the accused has been guilty of other distinct and independent crimes for the purpose of proving that he committed the offense charged, but an exception is recognized in that

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CRIMINAL LAW—Continued.

class of crimes where guilt depends upon the intent, guilty knowledge, and purpose with which the act charged is done, when evidence as to some overt act with intent to commit some felony not actually accomplished or a series of connected frauds, forgeries, passing counterfeit money, etc., is competent to establish guilty knowledge and criminal intent. *People* v. *Gengels*, 632.

47. In a prosecution for violating the provisions of Act No. 237, Pub. Acts 1899, as amended, by engaging as a chiropractor in treating human ailments and diseases without having filed a certificate of registration or copy thereof with the county clerk, as required, it was not error for the trial court to deny defendant's motion to quash the information for duplicity, where the prosecutor, after being required to elect, moved to amend, and the court ordered the information so amended and struck out what then became surplusage. *People* v. *Rose*, 642.

48. Even if Act No. 368, Pub. Acts 1913, amending Act No. 237, Pub. Acts 1899, is unconstitutional because in authorizing the State medical examining board to grant certificates of registration to those applying it is unreasonable, arbitrary, and discriminatory, defendant may still stand convicted of violating the provisions of said original act in practicing as a drugless healer for hire and reward without having filed a certificate of registration with the clerk of the county where he resides as required by said act. *Id.*

49. The question of the merits of a system of healing pursued for profit is for the legislative body which enacts the laws regulating its practice, and not for the courts. *Id.*

50. Where the testimony of uncontradicted witnesses showed that defendant admitted he was not registered as a chiropractor, that he had not filed a certificate of registration with the clerk of the county in which he resided and that during the period alleged he had treated various affected persons for hire, the trial court was not in error in instructing the jury that it was their duty to find defendant guilty as charged, since the undisputed facts presented a question of law for the court which was rightly construed. *Id.*

51. A complaint charging "that heretofore, to wit, on the 1st day of September, A. D. 1921, at the city of Battle Creek, in the county aforesaid, and for three months preceding that day, at the city of Battle Creek in said county, one N. was a disorderly person, by keeping a house resorted to for the purpose of prostitution and lewdness," in violation of a city ordinance, *held*, not open to the objection that it did not give the justice jurisdiction in that it did not allege that the house was located in Battle Creek. *People* v. *Thrine*, 687.

52. Prosecuting officers have the right to use their discretion

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CRIMINAL LAW—Continued.

in determining under which of applicable statutes or ordinances a prosecution shall be instituted. *Id.*

53. In a prosecution under a city ordinance as a disorderly person, where defendant was not in court, it was not error for the trial judge, of his own motion, to instruct the jury that the presence in court of defendant was not necessary, and the fact that she had not taken the stand in her own behalf did not raise any presumption of guilt against her. *Id.* 688.

54. In a prosecution in the recorder's court of the city of Detroit for larceny from a store, where the defense was want of sufficient mental capacity to commit the crime charged, a report by the director of a psychopathic clinic connected with said court as to defendant's mentality, *held*, not admissible as substantive evidence of defendant's mental condition. *People* v. *Williams*, 697.

55. Where two physicians had testified on behalf of defendant that her mentality was so defective that she was incapable of forming an intent to commit a crime, testimony in rebuttal by another physician was not open to the objection that it should have been offered by the people in making out the main case, since they had a right to proceed on the presumption that defendant had mental capacity until there was some testimony in the case to the contrary. *Id.*

56. Although none of the testimony of expert alienists as to defendant's defective mentality was admissible because of failure to lay the proper foundation therefor, where said testimony was admitted without objection on the part of the prosecutor, it was reversible error for him, in argument to the jury, to urge his opinion as against that of the alienists. *Id.*

57. Expert opinion evidence is not admissible unless the facts upon which the opinion was based are laid before the jury. *Id.*

58. Argument of the prosecutor that expert alienists, in coming into court and testifying as to defendant's mental condition, prostituted themselves, *held*, reversible error. *Id.* 698.

59. The charge of the court upon the subject of the burden of showing the mental condition of defendant, *held*, somewhat confusing, which would have been avoided had the court given defendant's request to charge thereon. *Id.*

See DISORDERLY HOUSES; HOMICIDE; INTOXICATING LIQUORS; MUNICIPAL CORPORATIONS (15).

CROSS-EXAMINATION—See CRIMINAL LAW (4, 19, 45); NEGLIGENCE (14); WITNESSES (2).

CROSSING ACCIDENT—See RAILROADS (6-10); STREET RAILWAYS.

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CROSSING FROGS—See RAILROADS (1-5).

CURING ERROR—See INTOXICATING LIQUORS (1, 2).

CUSTODY OF PROPERTY—See INSANE PERSONS.

CUSTOMS AND USAGES.

A person may not be held guilty of negligence for the breach of a duty created by a custom of which he has neither actual or constructive notice. *Grand Rapids Bedding Co.* v. *Grand Rapids Furniture Temple Co.*, 487.

See MASTER AND SERVANT (26-28); TRIAL (6).

DAMAGES.

1. In an action by a husband for damages caused by personal injuries to his wife, a verdict for $800 was not excessive where there was evidence that he expended in excess of $300 for doctors' and hospital bills and other expenses, that he was deprived of her help and companionship while she was in the hospital, and that her efficiency as a housewife has been lessened by her injuries which may be permanent. *Burns* v. *Township of Van Buren*, 44.

2. Where the decree in favor of plaintiff erroneously permitted him to retain from the purchase price interest not yet due, the same will be modified and affirmed. *Meade* v. *Brown*, 556.

See APPEAL AND ERROR (2); ATTORNEY AND CLIENT; EXCHANGE OF PROPERTY (1, 4); FRAUD (3, 4); NEGLIGENCE (11); SALES (6); SPECIFIC PERFORMANCE (4); TRIAL (4, 9); VENDOR AND PURCHASER (7-9).

DEATH—See MASTER AND SERVANT (15, 17); NEGLIGENCE (15).

DECREE OF SALE—See TAXATION (1).

DEDICATION BY USER—See HIGHWAYS AND STREETS (1).

DEEDS.

1. Evidence of opportunity alone is insufficient to establish the exercise of undue influence in the making of a deed by a mother to her daughter and son-in-law in consideration of a home and support for herself and daughter and two granddaughters. *Swick* v. *Hartman*, 206.

2. In a suit by children of the grantor, after her death, to set aside a deed on the ground of undue influence, where the record is convincing that, in the making of the contract whereby grantor deeded her farm to a daughter and son-in-law in consideration of a home and support for herself during her lifetime, and for a widowed daughter and children until the daughter remarried, there was no undue influence used, the contract was not unconscionable but was a favorable one for grantor, who was in need of constant attention, and who expressed no dissatisfaction,

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DEEDS—Continued.

and that it has been fully performed by the grantees, the decree of the court below in favor of defendants will be affirmed. *Id.*

3. On a bill by children of the grantor, after his death, to set aside certain deeds on the ground of mental incompetency and undue influence, evidence of undue influence *held*, sufficient to justify the decree of the court below setting said deeds aside. *Vhay* v. *Gies*, 394.

4. Under a deed conveying land to four persons, "as joint tenants, and to their heirs and assigns, and to the survivors or survivor of them, and to the heirs and assigns of the survivor of them, forever," a joint tenancy for life in the grantees was created, with a contingent remainder in fee simple to the survivor, and, therefore, one of the grantees could not alienate his joint interest so as to cut off the contingent remainder. *Jones* v. *Snyder*, 446.

5. The old as well as the young may dispose of their property as they see fit, the illiterate as well as the educated. *Kerr* v. *McHeney*, 678.

6. In a suit to set aside a deed of a farm by a father to defendant daughter, with whom he made his home, evidence *held*, insufficient to establish that grantor was incompetent to execute the deed. *Id.*

7. Evidence *held*, insufficient to establish undue influence, even if plaintiffs' contention is accepted that *quasi*-trust relations existed between grantor and defendant and the burden of proof is upon defendant to show that the transaction was in all respects fair. *Id.*

8. In a suit by a father to set aside a deed conveying 80 acres of land to defendant son, evidence *held*, sufficient to justify the finding of the court below that the deed was placed in escrow with the condition that it became effective only in case plaintiff did not return safely from an extended visit to Chicago. *Kuhlman* v. *Kuhlman*, 685.

See CANCELLATION OF INSTRUMENTS; COVENANTS; DISCOVERY (1); EASEMENTS (1); FRAUD (5); HOMESTEADS (1).

DEFECTIVE CROSSING—See RAILROADS (9); STREET RAILWAYS (8).

DEFECTIVE HIGHWAY—See MUNICIPAL CORPORATIONS (1).

DELAYED APPEALS—See JUSTICES OF THE PEACE (5, 6).

DELIVERY—See DEEDS (8); SALES (10).

DENIAL OF LIABILITY—See INSURANCE (6).

DESCENT AND DISTRIBUTION—See ESTATES OF DECEDENTS.

DETROIT CHARTER—See MUNICIPAL CORPORATIONS (22-24).

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DIRECTED VERDICT—See APPEAL AND ERROR (3, 15); INSURANCE (2); INTOXICATING LIQUORS (3, 5); JUDGMENT (3, 7); MASTER AND SERVANT (23); MUNICIPAL CORPORATIONS (24); NEGLIGENCE (2, 7, 15); PLEADING (2); TRIAL (5, 12).

DISABILITY DUE TO OLD AGE—See EVIDENCE (6); MASTER AND SERVANT (11).

DISCHARGE OF EMPLOYEE—See MASTER AND SERVANT (30).

DISCOVERY.

1. An order should not be issued for the discovery of conveyances, in the absence of allegation that they are forgeries or that they are not recorded in the office of the register of deeds, from whom certified copies may easily be obtained. *Lancashire* v. *Wayne Circuit Judge*, 16.

2. An order to produce documents should not include insurance policies not mentioned in the bill or shown relevant by the petition for discovery. *Id.*

3. An order for the discovery of the stenographer's minutes of the trial in a foreclosure case and of the subpœna issued and returned served in that case should have been vacated under Circuit Court Rule No. 49, § 5, subd. 3, upon the filing of an affidavit by the party required to make discovery, that he has no "knowledge or control" of said minutes, and no "possession or control" of the subpœna. *Id.*

4. An order to produce the original will, presumably in the files of the probate court, should be vacated where there is no allegation in the bill of complaint that defendant has surreptitiously removed it therefrom. *Id.*

5. One charged with conspiracy to defraud cannot be required to produce correspondence tending to establish his guilt. *Id.* 17.

6. The trustee of an estate charged with conspiracy to defraud may be required to produce books and documents kept by him as trustee, or copies of them. *Id.*

DISCRETION—See MUNICIPAL CORPORATIONS (10, 11, 13).

DISCRETION OF COURT—See CRIMINAL LAW (3, 4, 9, 10); JUSTICES OF THE PEACE (5); SPECIFIC PERFORMANCE (2); TRIAL (7).

DISMISSAL—See JUSTICES OF THE PEACE (4).

DISORDERLY HOUSES.

Proof that defendant kept a bawdy house in the city of Battle Creek justified her prosecution under an ordinance of that city entitled "An ordinance to prevent and suppress disorderly houses and assemblages and to punish disorderly persons," since a prostitute is a disorderly person; although she might have been prosecuted under another ordinance of said city entitled "An ordinance to suppress

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DISORDERLY HOUSES—Continued.

and prevent houses of ill-fame and to punish the keepers and inmates thereof." *People* v. *Thrine*, 688.

See CRIMINAL LAW (51).

DISORDERLY PERSONS—See CRIMINAL LAW (53); PROSTITUTES.

DISSOLUTION—See PARTNERSHIP (2).

DISTINCTION BETWEEN USE OF STREETS BY PUBLIC AND COMMON CARRIERS—See MUNICIPAL CORPORATIONS (8).

DISTRIBUTION PER CAPITA—See WILLS (5).

DISTURBING THE PEACE—See CRIMINAL LAW (1).

DIVORCE.

1. The word "alimony," though frequently defined as a portion of the husband's estate awarded to the wife for support, does not necessarily imply that he has any tangible property or known available resources from which alimony can presently be realized by legal process; nor is the power of the court to award an allowance so limited. *Van Dommelen* v. *Van Dommelen*, 149.

2. As a recognized incident of divorce, alimony is founded on the continuing obligation assumed by the husband under his contract of marriage to support his wife and children, not based exclusively on his property or estate, but also on his earnings or ability to earn and their necessities. *Id.* 150.

3. In making an award of alimony, and later in enforcing it, the court is expected and required to have due regard to the ability of the husband, and the character and circumstances of the parties and all other circumstances of the case, and is also required, under 3 Comp. Laws 1915, § 11436, to include a provision in lieu of dower not only in property which the husband then owns but "may thereafter own," or in which he may have an interest. *Id.*

4. Evidence *held*, to entitle defendant wife to a decree of divorce on her cross-bill. *Id.*

5. Where the wife was granted a divorce on her cross-bill, a showing that she has a six-months' old nursing child, that she has no property resources, or means of support except as aided by her parents, who are poor and without means, and what she could earn, an allowance of $1,000 in weekly payments of $5 to her, and $3 per week for support of the child, *held*, not so excessive as to amount to an abuse of discretion, although the husband is without property, calling, employment, or income. *Id.*

See VENDOR AND PURCHASER (11).

DOWER—See DIVORCE (3).

DUPLICITY—See CRIMINAL LAW (47).

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DUTY OF APPELLANT TO PERFECT INCOMPLETE RETURN —See JUSTICES OF THE PEACE (2).

DUTY OF PROSECUTOR—See CRIMINAL LAW (21).

EASEMENTS.

1. A reservation of a perpetual easement or right of way in the driveways upon certain conveyed lots for the joint use and benefit of the property owners of certain adjoining lots, their heirs and assigns, "adjacent to" said conveyed lots, construed, and *held*, to apply to the driveways along the border of the lots extending across them from one street to another, but not to apply to the driveway west of defendant's house, with consequent interference with or loss of the use of the porte-cochere thereon. *Henry* v. *Sinclair*, 296.

2. Plaintiff was not entitled to a decree restraining defendants from such use of said driveways as did not interfere with plaintiff's easement therein. *Id.* 297.

EFFECT OF READING NEWSPAPER REPORTS—See TRIAL (9).

ELECTION—See INTOXICATING LIQUORS (12); MASTER AND SERVANT (1).

ELECTIONS—See MUNICIPAL CORPORATIONS (6); QUO WARRANTO.

ELECTRICITY.

1. Where the common council of the city of Grand Rapids passed an ordinance for the regulation of an electric light and power company, which was ratified by the electors and accepted by the company, the rates provided therein are controlling rather than the rates published in the newspapers by the company prior to the vote on said ordinance by the electors; there being no reference in the ballots which were voted to the advertisements which appeared in the papers. *City of Grand Rapids* v. *Consumers Power Co.*, 414.

2. The electric light and power company, by putting into effect the rates as advertised by it, and continuing same for many years, did not waive its right to at any time, within the life of the ordinance, charge the maximum rates authorized therein, although higher than the rates as so advertised. *Id.*

ELEVATORS—See MASTER AND SERVANT (25, 26).

EMBEZZLEMENT—See CRIMINAL LAW (11, 12).

EMPLOYEE'S PREDISPOSITION TO DISEASE AGGRAVATED BY INJURY IMMATERIAL—See MASTER AND SERVANT (7, 14).

EQUITY.

A suit in equity for damages for the breach of a contract to renew a lease cannot be maintained on the ground that

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EQUITY—Continued.

it will avoid a multiplicity of suits at law as damages on account of the breach accrue, since it does not constitute a multiplicity of suits, within equity cognizance, where the right of action arises out of a single transaction between the same parties, and suits for damages for breach thereof, after the initial suit, must await accrual of such damages. *Stern Co.* v. *Friedman*, 258.

See ARBITRATION AND AWARD (2); CANCELLATION OF INSTRUMENTS; CONTRACTS (4); HOMESTEADS (1); MISTAKE (2).

EQUITY JURISDICTION—See RELIGIOUS SOCIETIES.

ESCROWS—See DEEDS (8).

ESTATES OF DECEDENTS.

1. Money belonging to the estate of a deceased person is subject to the provisions of her will, and therefore plaintiff, as an individual, is not entitled to an accounting therefor of the person in whose hands it is held. *Altfather* v. *Bloom*, 582.

2. Evidence *held*, insufficient to establish that defendant daughter has any money in her hands belonging to her father's estate. *Kerr* v. *McHeney*, 678.

See COMPROMISE AND SETTLEMENT (1).

ESTOPPEL—See HOMESTEADS (1); JUSTICES OF THE PEACE (4); LANDLORD AND TENANT; MASTER AND SERVANT (16); SPECIFIC PERFORMANCE (3); VENDOR AND PURCHASER (3).

EVIDENCE.

1. The testimony of interested witnesses should be weighed with that fact in mind. *Seifferlein* v. *Foerster*, 179.

2. In an action by attorneys for services rendered, testimony by one of the plaintiffs as to time spent by himself and his office force in and about said employment, although said matters were more or less of record in the office, was properly received where within his personal knowledge, and there was no occasion to produce the books of account. *McCulloch* v. *Von Zellen*, 278.

3. There was no reversible error in striking out the testimony of a witness as to what she was told, where it did not appear that the testimony related to something one of the plaintiffs had told her, but the record indicates confusion on the subject. *Id.*

4. Whether a letter, claimed to have been written by one of the plaintiffs to one of the defendants, which they had been notified to produce, was so written and received, *held*, for the jury. *Id.*

5. A letter to one of the plaintiffs, written by a person employed in defendants' office acting as their agent, *held*, admissible. *Id.*

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EVIDENCE—Continued.

6. The court will take judicial notice of the fact that the earning power of a person performing manual labor is usually lessened when he reaches the age of 77 years. *Letourneau* v. *Davidson*, 335.

7. Where the medical testimony was in conflict, the credit to be given thereto, as well as the other testimony, was for the jury. *Dunwoody* v. *Royal Indemnity Co.*, 358.

8. In an action on two promissory notes, where defendant claimed a set-off by reason of certain railway ties furnished plaintiffs, for which he claimed they had failed to give him credit, testimony by defendant as to what a man, who he claimed was sent by plaintiffs to inspect and load the ties, told him as to the number of ties left on the ground, was hearsay and incompetent. *Hughitt* v. *Sayen*, 451.

9. The admissions of an agent are only evidence against the principal when they constitute part of the *res gestæ*—when they accompany the transaction in which the agent acted, and what he states at a subsequent time is inadmissible. *Id.*

10. Testimony by a juror, in support of a motion for a new trial, that the question of the refusal of the court to allow them to view the premises was discussed in the jury room, and that he thought the jury were influenced thereby, *held*, incompetent. *Rucklich* v. *American Car & Foundry Co.*, 561.

See ADVERSE POSSESSION; APPEAL AND ERROR (3-8, 14); BANKS AND BANKING (1, 2); CONTRACTS (1); CRIMINAL LAW (1, 7, 8, 11, 12, 14, 15, 19, 22, 29, 31-38, 42, 43, 46, 54, 55, 57); DEEDS (1, 3, 7, 8); DISCOVERY (5, 6); DIVORCE (4); ESTATES OF DECEDENTS (2); EXCHANGE OF PROPERTY (4); FRAUD (1, 3, 5, 6, 8); HOMICIDE (1, 2, 4, 5, 7-9); INSURANCE (7-10, 12); INTOXICATING LIQUORS (3, 5, 7-10); JUDGMENT (2); MASTER AND SERVANT (5, 9, 15, 23, 27, 28); MISTAKE (3, 6); MUNICIPAL CORPORATIONS (2-4, 24); NEGLIGENCE (2-5, 8-15); NEW TRIAL (1); PAYMENT; RAILROADS (6, 10); RAPE; SALES (2, 7); SPECIFIC PERFORMANCE (1); STREET RAILWAYS (2, 3, 5-8); TRIAL (2, 4, 5, 11); VENDOR AND PURCHASER (2, 8); WILLS (1, 2).

EXCEPTIONS TO FINDINGS—See APPEAL AND ERROR (4).

EXCESSIVE AWARD—See DAMAGES (2); DIVORCE (5).

EXCESSIVE CLAIM—See MECHANICS' LIENS (2).

EXCESSIVE VERDICT—See DAMAGES; NEGLIGENCE (11); TRIAL (4).

EXCHANGE OF PROPERTY.

1. Where plaintiffs, after an exchange of properties, discovered that they had been defrauded, they had a right to affirm the contract and to call defendants to account for

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EXCHANGE OF PROPERTY—Continued.

the fraud, and to have a mortgage given by plaintiffs to defendants canceled if the damages sustained reached the amount of the mortgage. *Vanek* v. *Soumar*, 282.

2. Where the trial judge found defendants guilty of the fraud charged, he was in error in compelling plaintiffs to amend their bill to rescind the contract against their desire, especially where defendants asked no affirmative relief, and the property received by them had passed through several hands, had been neglected, and could not be returned in the condition it was at the time of the exchange. *Id.*

3. Defendant broker, who made fraudulent representations in negotiating the exchange, could not become an innocent purchaser of the mortgage given by plaintiffs on the property received by them. *Id.* 283.

4. Evidence *held*, sufficient to establish that plaintiffs' damages equaled the amount of the mortgage sought by them to be canceled. *Id.*

EXECUTION.

The court has power to grant amendment of a body execution made returnable in less than 20 days to conform to the statute (3 Comp. Laws 1915, § 12816), which requires executions to be returnable "not less than 20 nor more than 90 days from the date thereof;" failure to conform therewith rendering the execution voidable only. *In re Davis*, 220.

EXPENSE OF MAINTAINING RAILROAD CROSSING FROGS —See RAILROADS (1-5).

EXPERT TESTIMONY—See CRIMINAL LAW (56-58); INSURANCE (9).

FAILURE TO CALL WITNESSES SUBJECT TO COMMENT—See CRIMINAL LAW (40).

FAILURE TO RAISE ISSUE IN COURT BELOW—See APPEAL AND ERROR (12).

FEDERAL STATUTES—See MASTER AND SERVANT (17).

FICTITIOUS NAMES—See PARTNERSHIP (1).

FIDUCIARY RELATIONS—See WILLS (3).

FILLING STATIONS—See COVENANTS (2); HIGHWAYS AND STREETS (3).

FINDING OF DEPARTMENT OF LABOR AND INDUSTRY CONCLUSIVE IF SUPPORTED BY EVIDENCE—See MASTER AND SERVANT (13).

FIRE INSURANCE—See INSURANCE (2-5, 11-14).

FIRES—See NEGLIGENCE (4).

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FORFEITURE—See VENDOR AND PURCHASER (1).

FRAUD.

1. In an action for fraud and conspiracy, based upon the representation by defendant that he owned a certain patent, whereby plaintiff was induced to purchase an interest in a lease granting the right to use said patent, the conclusion of the trial court that no actionable misrepresentation was made, *held*, supported by the record, which shows that, whether defendant owned the patent or not, he had the right to grant the privilege secured to the lessees in the lease. *Walsh* v. *Schubiner*, 13.

2. In an action for fraud and deceit, based upon representations that a house sold to plaintiffs by defendants' agents was constructed of stucco upon tile, when in fact it was stucco upon wood, defendants were liable although the misrepresentations were made by their agents without their knowledge or consent. *Moynes* v. *Applebaum*, 198.

3. Evidence showing the difference in the cost of construction between stucco on tile and stucco on wood was properly received for its bearing on the question of damages. *Id.*

4. The trial court correctly instructed the jury that the measure of damages was the difference between the value of the premises as they were and their value had they been as represented. *Id.*

5. On a bill by the grantor to set aside a certain trust deed on the ground that its execution was procured by false and fraudulent representations, and that she did not fully understand that she was conveying property claimed by her to be her individual property as well as property belonging to her husband's estate, evidence *held*, insufficient to maintain the burden of proof assumed by plaintiff. *Torrent* v. *Torrent*, 381.

6. Since the trust deed must either stand or fall as a whole, where the evidence is insufficient to warrant setting it aside, plaintiff's bill will be dismissed. *Id.*

7. Fraud is not lightly to be presumed, and the burden is on those alleging it to prove it. *Baas* v. *Zinke*, 552.

8. In a suit to set aside an agreement regarding the probate of a will and certain conveyances executed pursuant thereto, the charge of fraud therein, *held*, not sustained by the proofs. *Id.*

See COMPROMISE AND SETTLEMENT (3); EXCHANGE OF PROPERTY; PARTNERSHIP (2); VENDOR AND PURCHASER (1).

GENERAL ISSUE—See SALES (5).

GOOD CHARACTER—See CRIMINAL LAW (17, 44).

GOOD FAITH—See INTOXICATING LIQUORS (8); MECHANICS' LIENS (2, 3); TRIAL (13).

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GREAT WEIGHT OF EVIDENCE—See APPEAL AND ERROR (8); CRIMINAL LAW (29); MUNICIPAL CORPORATIONS (2); NEGLIGENCE (9, 10); NEW TRIAL (1).

GROSS NEGLIGENCE—See RAILROADS (6, 7); STREET RAILWAYS (5).

GUARANTY—See PRINCIPAL AND SURETY.

GUARDIAN AND WARD—See INSANE PERSONS.

GUILTY KNOWLEDGE—See CRIMINAL LAW (26, 46).

HEARSAY—See EVIDENCE (3, 8).

HIGHWAYS AND STREETS.

1. A village street used openly, exclusively, and continuously as such by the public for more than 40 years is a public street, of which the village has control under 1 Comp. Laws 1915, § 2646, where the intention to dedicate is shown positively, although the record title is in defendant, adjoining property owner, and there is of record no deed or formal dedication to the village or the public. *Village of North Adams* v. *Wertz*, 507.

2. That for much of the time the street was used as such defendant had chairs upon the sidewalk for the convenience of his guests, would afford no ground for claiming prescriptive rights as against the village. *Id.*

3. Since the village has the control of its streets (1 Comp. Laws 1915, §§ 2646, 2650), and therefore the right to prohibit the installing of gasoline filling stations therein, defendant was properly enjoined from installing a filling station in the main street adjoining his property without permission of the village. *Id.*

See MUNICIPAL CORPORATIONS (1, 4, 7-9); RAILROADS (3); STREET RAILWAYS (1).

HOMESTEADS.

1. In a suit by a son to set aside a deed of a house and lot by his father to his house-keeper, who in turn conveyed to defendants, on the ground that the earnings of himself and sister were used to help pay for same, that it was a homestead, and that his father could not convey same without consent of his wife who was insane, where it appears that plaintiff and his sister had knowledge of said conveyance, that the wife is not a party seeking relief, and that the purchasers of the property acted in good faith and paid full value therefor, plaintiff has no standing in a court of equity. *Altfather* v. *Bloom*, 582.

2. A contract whereby a father agreed that the homestead should go to a son at the death of the survivor of himself and wife, where not assented to by the wife in writing, is void under Art. 14, § 2, of the Constitution. *LaLonde* v. *Bloom*, 588.

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HOMICIDE.

1. In view of 3 Comp. Laws 1915, § 15192, defining murder in the first degree, where there was evidence from which the jury might infer that the theory of the prosecution that defendant committed the murder while attempting to commit rape was right, there was no error in submitting the case to the jury on said theory, under proper instructions. *People* v. *Best*, 141.

2. Evidence *held*, sufficient to establish the *corpus delicti*. *Id.*

3. Where there was evidence to support the charge that defendant killed deceased in an attempt to commit rape, an offense made murder in the first degree by 3 Comp. Laws 1915, § 15192, an instruction that there was little evidence touching on the phase of manslaughter, *held*, not prejudicial error. *Id.*

4. In a prosecution for involuntary manslaughter under 1 Comp. Laws 1915, § 4817, where the information charged defendant with the killing of a man, under the first count, while driving an automobile at the reckless and dangerous rate of speed of 35 miles an hour, under the second count, while driving an automobile while intoxicated, and under the third count while approaching and traversing a certain bridge and deep descent without having his automobile under control, and the issues under all three counts were submitted to the jury, the result of the finding of defendant guilty under the third count was to acquit him of the charges in the first and second. *People* v. *Harrigan*, 235.

5. Where there was no evidence of either a bridge or a steep descent at the place of the killing, there was a fatal variance between the information and the proofs. *Id.*

6. The acquittal under the first and second counts sheared the third count of every essential element of the crimes charged in the first and second counts, and prevented a verdict of guilty for criminal recklessness in driving unless while approaching or traversing a steep descent. *Id.* 236.

7. Testimony *held*, to completely negative the charge that defendant, at the place of the killing, was approaching or traversing a steep descent, and therefore his conviction was error. *Id.*

8. A view of the *locus in quo* by the jury is to permit them to better understand the evidence offered and not to supply evidence; and, therefore, a conviction contrary to the evidence offered by the prosecution is not authorized thereby. *Id.*

9. Where defendant's conviction was contrary to the evidence, his motion for a new trial should have been granted. *Id.*

10. Defendant's conviction contrary to the evidence was so prejudicial to his rights that the conviction cannot be

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HOMICIDE—Continued.

saved under 3 Comp. Laws 1915, § 14565, providing that no case shall be reversed for error unless resulting in a miscarriage of justice. *Id.*

See CRIMINAL LAW (14, 15).

HOSTILE POSSESSION—See ADVERSE POSSESSION (3).

HUSBAND AND WIFE—See APPEAL AND ERROR (2); CRIMINAL LAW (42, 45); DAMAGES (1); DIVORCE; HOMESTEADS.

IMMATERIAL MATTER—See CRIMINAL LAW (19).

IMPEACHING VERDICT—See CRIMINAL LAW (30); EVIDENCE (10).

IMPEACHMENT—See RAPE (5); WITNESSES (2).

IMPRISONMENT FOR DEBT—See MUNICIPAL CORPORATIONS (18)

INCOMPLETE RETURN—See JUSTICES OF THE PEACE (3, 4).

INCONSISTENT COUNTS MAY BE PLEADED AGAINST DIFFERENT DEFENDANTS WHEN IN DOUBT AS TO WHICH IS LIABLE—See PLEADING (1).

INDEMNITY BOND—See MUNICIPAL CORPORATIONS (17).

INDEPENDENT CONTRACTOR—See NEGLIGENCE (1).

INDORSING NAMES ON INFORMATION—See CRIMINAL LAW (9).

INDUCEMENT TO COMMIT CRIME—See INTOXICATING LIQUORS (6).

INFANTS—See STREET RAILWAYS (7).

INFERENCES—See CRIMINAL LAW (2); MUNICIPAL CORPORATIONS (13); RAILROADS (10).

INFORMATION—See CRIMINAL LAW (9, 47); HOMICIDE (4, 5); INTOXICATING LIQUORS (12).

INJUNCTION.

Equity will not restrain the driver of a laundry wagon, who had been working on a certain route on salary and commission, and who had severed his relations with his former employer, from working in said territory for a competitor, where he does not use any trade secrets or list of customers furnished by his former employer, but the business produced was largely the result of his own industry, and the provisions of Act No. 171, Pub. Acts 1917, are not involved. *Federal Laundry Co.* v. *Zimmerman*, 211.

See COVENANTS (3); EASEMENTS (2); HIGHWAYS AND STREETS (3); VENDOR AND PURCHASER (1).

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INNOCENT PURCHASER—See EXCHANGE OF PROPERTY (3).

INSANE PERSONS.

Where plaintiff had been adjudged insane and a guardian appointed to manage his estate, an adjudication by the probate court that plaintiff is now sane does not entitle him to the custody of his property in the absence of an adjudication that he is competent to manage same (3 Comp. Laws 1915, § 13950). *In re Minock's Estate*, 97.

See CRIMINAL LAW (54, 55).

INSTRUCTIONS—See APPEAL AND ERROR (2); CRIMINAL LAW (13, 16, 17, 25-28, 44, 53, 59); FRAUD (4); HOMICIDE (1, 3); INTOXICATING LIQUORS (1, 4, 8, 10); MUNICIPAL CORPORATIONS (5); NEGLIGENCE (1); SALES (6, 8, 9); TRIAL (1, 3, 6, 9).

INSURANCE.

1. Section 8, chap. 1, part 3, of Act No. 256, Pub. Acts 1917, requiring companies engaging in the casualty insurance business to comply with the laws regulating the business of life insurance in respect to making annual statements of financial conditions "and with all the other requirements so far as applicable," *held*, not to require casualty companies to comply with section 3, chap. 2, part 3, prohibiting the insertion of a clause in their policies limiting the time within which an action thereon could be brought to less than six years after the cause of action accrued. *Witkowski* v. *Fidelity & Casualty Co.*, 21.

2. Although notice had been given to defendant insurance company that the policy on which action was brought had been assigned to plaintiffs' attorney where there was no proof of any assignment, and the attorney testified that the notice was a mistake and he had no interest in the policy but that it belonged to plaintiffs, and there was no intimation from defendant's attorney that he desired to go to the jury upon any question in the case, the trial court was not in error in directing a verdict for the undisputed amount of damages in favor of plaintiffs, who, under the proofs, were the "real party in interest" (3 Comp. Laws 1915, § 12353). *Aromo* v. *Fire Ass'n of Philadelphia*, 204.

3. An action at law upon a Michigan standard policy may not be maintained by insured for a loss by fire while an award by appraisers under the provisions of part 4, chap. 2, § 6, Act No. 256, Pub. Acts 1917, stands unrevoked; his remedy, if any, being in equity to avoid the award. *Innis* v. *Fireman's Fund Ins. Co.*, 253.

4. Where the legislature prescribes a standard form of insurance policy, fixing therein terms, conditions, obligations, and method of determining liability and procedure to enforce same, insurance thereunder becomes a matter of contract subject to such statutory regulations, and an insured cannot successfully claim that his constitutional right to a jury trial has been thereby taken away. *Id.*

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INSURANCE—Continued.

5. Nor may plaintiff maintain an action upon the failure of the appraisers to state separately the sound value and loss or damage of each item of the policy. *Id.*

6. In an action on a policy of insurance against the theft of an automobile, where plaintiff gave notice of his loss to the agents who issued the policy, and a man from their office took him to an adjuster of the company who denied the claim, plaintiff was justified in acting upon the belief that said adjuster was an agent of the company, and the denial excused him from proving his loss. *Bird* v. *St. Paul Fire & Marine Ins. Co.*, 266.

7. Evidence from which the jury could reasonably infer a theft of the car was sufficient, and it was not incumbent upon plaintiff to negative conjectural defenses on the part of the person who took it. *Id.*

8. In an action on an accident insurance policy containing a rider covering accidental septic poisoning resulting from external inoculation, where the theory of plaintiff was that insured, a physician, was accidentally inoculated with the septic germs of influenza by a patient he was examining involuntarily coughing in his face, thereby injecting the germs into his mouth, which caused his death, it was competent to establish by said patient what his symptoms were, and by medical evidence what disease such symptoms indicated. *Dunwoody* v. *Royal Indemnity Co.*, 358.

9. Testimony by an officer of defendant insurance company as to the meaning of certain words in the rider, as understood by the "class of people it was intended to cover," *held*, properly rejected, where witness had not qualified himself to testify on the subject. *Id.*

10. Where the medical testimony of plaintiff, if believed, made as certain as medical testimony can make certain, that deceased had influenza followed by pneumonia, that it was septic in its nature, of a most virulent type, and that it was contracted from the sputum, septic matter, which the patient accidentally threw into insured's mouth, it cannot be said that the cause of his death rests on conjecture, guesses, or speculation, and the case was properly submitted to the jury. *Id.*

11. A clause in an insurance policy providing that in the event of disagreement as to the amount of the loss or damage the same must be appraised before recovery can be had may be waived by the insurer. *Rott* v. *Westchester Fire Ins. Co.*, 576.

12. In an action on an insurance policy for the loss of an automobile by fire, testimony by plaintiff that defendant's adjuster told him he would have to accept $250 or nothing—that if he did not accept it he could bring suit, *held*, to justify submitting to the jury the question as to whether such conduct amounted to a waiver of the right to an appraisal. *Id.*

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INSURANCE—Continued.

13. It cannot be said that it is unfair to insurer to permit waiver of arbitration by parol evidence, although expressly provided for in the policy, since insurer may always secure same by making a demand therefor, and thus leave no doubt of its intention to rely thereon. *Id.*

14. Where a written statement of loss was prepared by the defendant's adjuster and signed and verified by the oath of insured, and the automobile was examined soon after the fire by said adjuster, and no further proof of loss was suggested to or required of insured, the question of waiver of proofs of loss was for the jury. *Id.*

See APPEAL AND ERROR (14); PARTNERSHIP (1):

INTENT—See ADVERSE POSSESSION (5); CRIMINAL LAW (13, 46); INSURANCE (7); INTOXICATING LIQUORS (7, 8); MUNICIPAL CORPORATIONS (15); RAPE (1); STATUTES (3); TRIAL (10); WILLS (2, 4).

INTERESTED WITNESSES—See EVIDENCE (1).

INTERSTATE COMMERCE—See MASTER AND SERVANT (17).

INTOXICATING LIQUORS.

1. In a prosecution for violation of the liquor law, where defendant was charged with selling and keeping for sale, giving and furnishing and having possession of intoxicating liquors on July 4, 1921, the allegation of "time" being made under a videlicet, if the admission of testimony as to a sale made on July 3d was erroneous, the error was cured by the instruction of the court to the jury to disregard same; time not being of the essence of the offense. *People* v. *Williams*, 436.

2. Where defendant's counsel kept insisting that the prosecutor was asking leading questions of a certain witness, a statement by the latter "Now, just a minute, witness, I insist that this is a hostile witness and I have a right—I have a statement in a John Doe proceeding. I know what I am up against in liquor cases and I am not going to stand for it at all," *held*, although improper, not prejudicial error, in view of the instruction of the court to the jury that the statement was improper and to disregard it. *Id.*

3. Where the testimony offered, if believed, would justify the jury in finding defendant guilty of the offense charged, the court was not in error in refusing to direct a verdict in his behalf. *Id.* 437.

4. Where defendant's counsel argued to the jury that they should not separate defendant from his wife and send him to a felon's cell, the court properly instructed them that they were not concerned in the penalty, and should not be influenced thereby. *Id.*

5. In a prosecution for violation of the liquor law, where defendant admitted that he sold a quart of whisky, the

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INTOXICATING LIQUORS—Continued.

trial court was justified in instructing the jury that it was their duty to convict him. *People* v. *McIntyre*, 540.

6. The acts of the officers of the law in gaining the confidence of defendant and inducing him to sell them the liquor did not constitute an unlawful inducement, justifying his acquittal, since it is only when the criminality of the act is shown to be absent by the fact of the inducement that such proof justifies acquittal. *Id.*

7. In a prosecution for violation of the liquor law, where defendant admitted the sale of two pints of whisky as charged, but claimed as a defense that he did it for the purpose of securing evidence against the person from whom he procured it, although he admitted that the persons to whom he sold it had no knowledge of such intent, the trial court properly instructed the jury that if they believed the testimony of the witnesses to whom the sale was made, and that the admissions of defendant were true, it was their duty to convict. *People* v. *Schiddel*, 544.

8. Defendant was not entitled to an instruction that if the admitted sale was made in good faith for the purpose of detecting and exposing another as a violator of the law, defendant should be acquitted, since intent is not an element of the offense. *Id.*

9. Since the statute (3 Comp. Laws 1915, § 12611) providing for the submission of special questions to the jury has application only in the trial of civil cases, the trial court was in error in submitting to the jury the special question as to whether defendant, in making the admitted sale, acted in good faith for the purpose of detecting and exposing a violator of the law. *Id.*

10. In a prosecution for violating the liquor law, where it was conceded that the officer searched defendant's grip without a search warrant and without a warrant for his arrest, but the officer claimed that defendant invited him to search the grip, which was denied by defendant, the trial judge should have instructed the jury that said search was illegal under Art. 2, § 10, of the Constitution, unless defendant invited the officer to do so. *People* v. *Foreman*, 591.

11. In a prosecution for violating the liquor law, where the affidavit upon which the search warrant was issued contained positive averment of facts justifying the issuance of the writ, the jurisdiction of the magistrate to issue it was not lost by proof *aliunde* that the facts therein positively stated were in reality upon information and belief. *People* v. *Ozckay*, 660.

12. Where the information charged, in the first count, that defendant, on the 26th day of July, 1921, unlawfully had in his possession prohibited liquors, "to wit, two gallons of moonshine whisky so-called," and in the second count, that defendant on the same date sold to a certain person

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INTOXICATING LIQUORS—Continued.

"one pint of moonshine whisky so-called," but the proofs showed that the sale alleged was made on July 24, 1921, the trial court was in error in not requiring the prosecutor to elect on which count he would go to the jury, since the proofs showed two separate and distinct offenses, requiring different proof. *Id.*

See CRIMINAL LAW (3-7).

INVALIDITY OF SEPARABLE PARTS OF ORDINANCE DOES NOT RENDER WHOLE INVALID—See MUNICIPAL CORPORATIONS (21).

INVOLUNTARY MANSLAUGHTER—See HOMICIDE (4).

IRREGULARITY IN ARBITRATION PROCEEDINGS NOT INVOLVED IN FINAL HEARING—See MASTER AND SERVANT (3).

ISSUE DEPENDENT UPON PROOF NOT TO BE DISPOSED OF BY MOTION—See APPEAL AND ERROR (13).

JACKSON CHARTER—See MUNICIPAL CORPORATIONS (6).

JOINDER OF ACTION—See ACTION.

JOINT TENANCY—See DEEDS (4).

JUDGMENT.

1. The burden of establishing the defense of *res adjudicata* was upon defendants. *Gregor* v. *Olde*, 187.

2. An unsigned notation on the file of a case before a circuit court commissioner that judgment had been entered, with testimony from the clerk that the commissioner said it was in his handwriting, *held*, insufficient to establish a judgment and sustain the defense of *res adjudicata*. *Id.*

3. The denial of defendant's motion for a directed verdict without any statement from the judge that decision thereon was reserved under the statute (3 Comp. Laws 1915, § 14568), would not preclude the judge from granting a motion to enter judgment *non obstante veredicto*, where, although the verdict was recorded, judgment thereon was stayed to permit the making of said motion; such proceeding clearly indicating that the judge reserved final decision of the question. *Day* v. *Grand Rapids Ry. Co.*, 215.

4. In an action against a street railway company for personal injuries, where defendant pleaded a release, plaintiff's testimony on direct-examination that the release was obtained by fraud, although somewhat contradicted by her on cross-examination, made a case for the jury, since it was their province, and not that of the court, to say which of plaintiff's versions was to be believed, and the entry of judgment *non obstante veredicto* was error. *Id.*

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JUDGMENT—Continued.

5. A finding by the circuit judge that an order of a former circuit judge, now deceased, setting aside a decree and ordering a rehearing was obtained *ex parte* in chambers without notice, affidavit, or petition, and upon insufficient grounds for a rehearing, justified an order setting aside said order granting a rehearing under 3 Comp. Laws 1915, § 12139, and therefore mandamus will not issue to compel the vacation of said last order. *Flowers* v. *Wayne Circuit Judge*, 500.

6. If the decree was settled and signed without notice to counsel, a motion should have been made to set it aside; if it was against the just rights of a party or rendered by reason of a misapprehension of the facts a rehearing should have been applied for. *Id.*

7. When a verdict is directed, the judgment entered thereon is final; and when judgment is set aside a new trial should be granted. *Quinn* v. *New York Life Ins. Co.*, 650.

8. Where judgment for plaintiff was entered on a directed verdict, the issue not having been submitted to the jury, the trial court was without authority, under 3 Comp. Laws 1915, § 14568, on defendant's motion for a new trial, to set aside the judgment entered and enter judgment for defendant *non obstante veredicto*, but, the evidence being conflicting, the motion for a new trial should have been granted. *Id.* 651.

9. Indorsers not being joint makers of a note under the negotiable instruments act (2 Comp. Laws 1915, § 6104), their contract is not the contract of the maker, nor is his contract their contract (section 6041), therefore an action against the maker does not bar a subsequent action against the indorsers, the liabilities of the parties being different. *Marine Trust Co. of Buffalo* v. *Roden*, 693.

See VENDOR AND PURCHASER (1, 11).

JUDICATURE ACT—See ACTION (1); APPEAL AND ERROR (4, 5, 9, 10); CRIMINAL LAW (42); INSURANCE (2); INTOXICATING LIQUORS (9); JUDGMENT (5); JUSTICES OF THE PEACE (1, 5); MANDAMUS; QUO WARRANTO; STATUTES (4); TAXATION (2).

JUDICIAL NOTICE—See EVIDENCE (6).

JURISDICTION—See CRIMINAL LAW (51); EQUITY; INTOXICATING LIQUORS (11); JUSTICES OF THE PEACE (1, 6).

JURORS—See EVIDENCE (10).

JURY—See APPEAL AND ERROR (8); EVIDENCE (7); STATUTES (1).

JUSTICES OF THE PEACE.

1. Since, under 3 Comp. Laws 1915, §§ 13231, 13241, a justice of the peace has jurisdiction in summary proceedings only when the premises in question are located in the township in which he holds office, section 12182, providing

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JUSTICES OF THE PEACE—Continued.

that any other circuit court commissioner "or other officer having authority to perform the like duty in the same county," may hear and determine a summary proceeding begun by a circuit court commissioner in case the commissioner is absent or disqualified, *held*, not to extend the jurisdiction of the justice to lands beyond the township in which he is justice. *Lada* v. *Laszlo*, 10.

2. On appeal from a judgment in justice's court the duty is on appellant, if the justice's return is defective or incomplete, to perfect same or abide the judgment as it stood. *Wackenhut* v. *Washtenaw Circuit Judge*, 655.

3. Where it is conceded that the justice's return was incomplete, and appellant took no steps to perfect same within a reasonable time, appellee's motion to dismiss the appeal should have been granted. *Id.*

4. Appellee was not estopped from moving to dismiss the appeal by reason of his counsel's inapt proposal that if it devolved upon him to perfect the appeal, permission be granted him to make the amendment and then proceed to trial immediately, where his suggestion was not acquiesced in by the court. *Id.*

5. Under the provisions of the judicature act dealing with appeals from justices' courts (3 Comp. Laws 1915, § 14408), the circuit courts are not given general discretion to allow appeals in any case after the expiration of five days, where, in their judgment, it would be equitable, but that discretion is limited to that class of cases in which appellant was prevented from appealing within five days by circumstances beyond his control. *Selby* v. *Brading*, 667.

6. A showing by the garnishee defendant that its secretary wrote the justice a letter denying any liability to the principal defendant, but made no sworn disclosure, and did nothing further until after the judgment was entered and the time for appeal had expired, *held*, insufficient to confer jurisdiction on the circuit court to grant an appeal. *Id.*

See CRIMINAL LAW (51).

JUSTIFICATION—See MASTER AND SERVANT (30).

LACHES—See SPECIFIC PERFORMANCE (3).

LAND CONTRACTS—See VENDOR AND PURCHASER.

LANDLORD AND TENANT.

Where the purchaser of a building leased to a voluntary association as an armory knew that it had been rented to various organizations for public meetings without objection from the lessor, he was in no position to claim that the covenant against subletting was thereby breached. *Struble* v. *Community Club*, 604.

See CONTRACTS (4); NEGLIGENCE (1).

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LARCENY—See CRIMINAL LAW (8, 54).

LEASE—See LANDLORD AND TENANT; MISTAKE (5); VENDOR AND PURCHASER (3).

LEGAL LIABILITY—See MASTER AND SERVANT (24).

LETTERS—See EVIDENCE (4, 5).

LIABILITY OF MASTER WHERE SERVICES WHOLLY PERFORMED OUTSIDE OF STATE—See MASTER AND SERVANT (8).

LIABILITY OF THIRD PARTY—See MASTER AND SERVANT (24).

LIABILITY FOR FAILURE TO OBTAIN LOAN—See ATTORNEY AND CLIENT.

LICENSE FEE—See MUNICIPAL CORPORATIONS (14).

LICENSE NUMBERS—See NEGLIGENCE (13).

LICENSES—See CRIMINAL LAW (31); MUNICIPAL CORPORATIONS (10-12).

LIMITATION OF ACTIONS—See INSURANCE (1); QUO WARRANTO; TAXATION (2).

LOCAL PREJUDICE—See CRIMINAL LAW (30).

MANDAMUS.

Under the judicature act (3 Comp. Laws 1915, § 13438), it was not necessary for appellee to first apply to the trial court to set aside the order denying dismissal before petitioning for mandamus to compel its vacation. *Wackenhut* v. *Washtenaw Circuit Judge*, 655.

See JUDGMENT (5).

MANSLAUGHTER—See HOMICIDE (3).

MARRIAGE.

Marriage is a life contract imposing on the husband support and maintenance of the wife in sickness and in health during life, contingent only on termination sooner by decree of a court for statutory reasons. *Van Dommelen* v. *Van Dommelen*, 150.

MASTER AND SERVANT.

1. Although an employee, injured in the course of his employment by collision with a street car, allowed his employer's insurer to pay his hospital and doctor's bills (2 Comp. Laws 1915, § 5434), he did not thereby elect to proceed against his employer under the workmen's compensation act and thus bar his right to bring an action at law against the street railway company (2 Comp. Laws 1915, § 5468), where he made no claim for compensation under the act. *Fox* v. *Detroit United Ry.*, 5.

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MASTER AND SERVANT—Continued.

2. Where an injured employee wrote to the industrial accident board canceling the hearing on his claim and stating that he had settled with his employer and its insurer, but said settlement agreement was never submitted to, or approved by, the industrial accident board, the board had the right, if not the duty, to order arbitration of said claim regardless of said alleged settlement. *Fritz* v. *Rudy Furnace Co.*, 324.

3. While the appearance of a deputy commissioner of the industrial accident board as attorney for plaintiff at the arbitration hearing was indefensible and highly improper, such irregularity is not involved in the final hearing before the full board which has no power to vacate the arbitration proceedings or to order another arbitration, but hears the case *de novo* and determines it upon the testimony already taken, and such additional testimony as the parties may submit. *Id.*

4. The power of the Supreme Court, on review of an award under the workmen's compensation act (2 Comp. Laws 1915, § 5465), is to review questions of law involved in the final determination of the board, and make such order in respect to such final determination as justice may require. *Id.*

5. Testimony that an employee, a laborer in a foundry, was injured in the side by the slipping of a bull ladle from which he was assisting to pour molten iron, and that an attack of appendicitis which immediately followed was probably caused thereby, *held*, sufficient to sustain an award of compensation therefor under the act, although there was also testimony that the appendicitis was caused by an attack of influenza. *Id.*

6. An attack of appendicitis caused by an accidental injury to the side is an accidental personal injury within the meaning of the workmen's compensation act. *Id.* 325.

7. That plaintiff's disability may have resulted from the accidental aggravation of a chronic ailment, and that he may have been predisposed because of disease to an attack such as befell him, *held*, immaterial in determining the question as to whether his injury was accidental. *Id.*

8. An employer who has voluntarily become subject to the provisions of the workmen's compensation act may not avoid liability thereunder for an employee's accidental death in a foreign State on the ground that the contract of employment contemplated that all of the services thereunder were to be performed in foreign States, since the relation of employer and employee under said act is contractual and the provisions of the act are to be read into the contract of employment, which is a Michigan contract enforceable by a Michigan tribunal, and the rights of the employee thereunder accompany him wherever he goes within the scope of his employment. *Hulswit* v. *Escanaba Manfg. Co.*, 331.

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MASTER AND SERVANT—Continued.

9. Defendant's claim that it was not liable because, at the time of the accident resulting in his death, deceased was violating its instructions by traveling in an automobile instead of by train, *held*, not supported by competent proof that such instructions were given. *Id.* 332.

10. Under the workmen's compensation act (2 Comp. Laws 1915, § 5467), the industrial accident board, on the hearing of a petition to review an award theretofore made by it, may not review the facts establishing liability as found by it, but the amount of the weekly payment ordered, due to changed physical condition of the party injured, may be ended, diminished, or increased, subject to the maximum and minimum amounts provided in the act, if the facts proven warrant such action. *Letourneau* v. *Davidson*, 334.

11. On petition of the employer to review an award of compensation to an injured employee, who was 77 years old, the industrial accident board was not justified in reducing the amount of the weekly award one-half on the ground that the continuing disability was due about equally to the injury and to conditions incident to old age, since the act is applicable alike to all ages, and the amount to be awarded is in no way dependent upon the probability of a more speedy and complete recovery by a person young in years than by one of advanced age. *Id.* 335.

12. Where plaintiff, a watchman, in making his rounds, rode a bicycle, and, in passing between two piles of lumber, lost his balance, grasped the end of a board and fell, the injuries caused thereby, resulting in partial paralysis, were accidental within the meaning of the workmen's compensation act, in the absence of proof that plaintiff was guilty of wilful misconduct. *Carvey* v. *W. D. Young & Co.*, 342.

13. Although plaintiff had suffered from arterio sclerosis and high blood pressure for some time, and was subject to occasional attacks of dizziness, where there was testimony that on the day of the accident he was all right, the finding of the department of labor and industry that his injury was accidental rather than due to disease and natural infirmities must be sustained, since the department is the trier of the facts, and its finding, if it has evidential support, is conclusive. *Id.*

14. That plaintiff was predisposed, because of disease, to the form of attack from which he suffered, has nothing to do with the question of whether what befell him on the occasion in question is to be regarded as an accident. *Id.*

15. Where an employee in a mine was found dead by a fellow employee, and there was no mark upon the body and no evidence of any injury or of the cause of death, no autopsy having been held, the cause of death was conjectural, and a finding by the department of labor and industry that death was accidental within the meaning of the workmen's compensation act is lacking in evidential

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MASTER AND SERVANT—Continued.

support and must be reversed. *Allen* v. *Robert Gage Coal Co.*, 347.

16. A statement to plaintiff by a clerk at the mine, after consulting an assistant in the office of the general manager, that defendant would assume responsibility for the death and that an autopsy would be unnecessary, does not constitute an estoppel, in the absence of evidence of authority to make said statement or of its ratification by defendant. *Id.*

17. One employed to help coal and water locomotives used in interstate commerce is engaged in interstate commerce, and, therefore, an action for his negligent death may be maintained against the director general of railroads under the Federal statute (35 U. S. Stat. p. 65). *Buell* v. *Hines*, 353.

18. After deceased reached the railroad yards, and while traveling to the coal dock, where he was employed, in the usual way, the relation of master and servant existed. *Id.*

19. Where a servant voluntarily and of his own motion exposes himself to risks outside of the scope of his regular employment, without or against the order of the master or vice-principal, and is injured thereby, the master is not liable. *Id.*

20. Where deceased, instead of traveling his usual safe route between the tracks, on his way from the yard to his work at the coal dock, stepped onto the foot board of a passing locomotive, thereby choosing an obviously dangerous position without the knowledge of the master, he assumed the attendant risk, and the master may not be held liable for his death as the result of a collision between the locomotive and a freight train. *Id.*

21. An insurance company carrying the risk for an employer operating under the provisions of the workmen's compensation act may not maintain an action in its own name against a third party, claimed to be a wrongdoer causing the injury, for the amount paid the employee as compensation under said act, but said action must be brought in the name of the employer under the provisions of the statute (2 Comp. Laws 1915, § 5468) authorizing such action. *Michigan Employers Casualty Co.* v. *Doucette*, 363.

22. Under said statute, no assignment is necessary, the right being conferred by way of subrogation. *Id.* 364.

23. In an action by a "car rider" on a switch engine for personal injuries caused by the derailment of the engine by a coupling knuckle in a frog in the track, a verdict was properly directed in favor of defendant in the absence of evidence of any actionable negligence on the part of defendant or its employees. *Frebes* v. *Michigan Central R. Co.*, 367.

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MASTER AND SERVANT—Continued.

24. The liability of a third person to an employer, under the provisions of the workmen's compensation act (2 Comp. Laws 1915, § 5468), for the amount paid as compensation to an employee or his dependents under said act, arises only where such third person is guilty of negligence creating a legal liability, and unless a legal liability exists the action may not be maintained. *Grand Rapids Bedding Co.* v. *Grand Rapids Furniture Temple Co.*, 486.

25. Where an operator was provided for an elevator in a building owned by defendant and occupied by a number of tenants, of which plaintiff was one, and a buzzer was installed for the purpose of summoning the operator to the desired floor, but plaintiff's employee, disregarding the buzzer, opened the elevator doors at the ground floor although they were nearly closed, and, thinking the elevator was at that floor, stepped inside, when he fell to the bottom of the elevator shaft and received injuries causing his death, he was guilty of contributory negligence, as a matter of law, barring an action by his employer under the workmen's compensation act to recover compensation paid to the employee's widow for his death. *Id.*

26. If there was a custom of leaving the elevator doors partly open when the elevator was at the ground floor, if such opening was notice that the elevator was there, if it was an invitation to enter and use the elevator, and if defendant had notice of such established custom, then the questions of defendant's negligence and deceased's contributory negligence were for the jury. *Id.* 487.

27. Although the testimony as to such custom was very meagre, it cannot be said that there was no such testimony. *Id.*

28. In the absence of a motion for a new trial, the Supreme Court will not weigh the evidence as to such custom, except to say that it did not establish so notorious a custom that it can be said, as a matter of law, that defendant had notice of it, nor was there testimony of actual notice. *Id.*

29. An offer in a contract of employment reading "We will agree to pay you at the rate of $6,000 the first year, $6,600 the second year, and $7,200 the third year," may fairly be inferred to contemplate a hiring for three years, and, when accepted, will be construed to result in a hiring for three years. *Loew* v. *Hayes Manfg. Co.*, 595.

30. The question as to whether defendant employer was justified in terminating plaintiff's employment before the expiration of the contract was properly submitted to the jury, under the evidence. *Id.*

See INJUNCTION; NEGLIGENCE (1, 6).

MASTER NOT LIABLE FOR NEEDLESS RISK OF SERVANT —See MASTER AND SERVANT (19).

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MEASURE OF DAMAGES—See FRAUD (4); SALES (6); VENDOR AND PURCHASER (7).

MECHANICS' LIENS.

1. On appeal by the defendants from a decree in favor of plaintiffs, in a suit to enforce a mechanics' lien on property held by husband and wife, the defense urged by defendants that the service of the order required by 3 Comp. Laws 1915, § 14801, establishing the lien, was defective, *held*, under the evidence, too technical, in view of section 14822 declaring the statute to be remedial and to be construed liberally. *Martin* v. *Trautz*, 51.

2. In a suit to enforce a mechanics' lien under 3 Comp. Laws 1915, § 14800, requiring "a just and true statement or account of the demand due him," where a mistake in claiming an excessive amount is not made in bad faith, but there is an honest mistake of fact made in the honest belief of its correctness, the lien will not be lost by reason of the excessive claim. *Ypsilanti Lumber & Coal Co.* v. *Leslie*, 664.

3. Although lumber for a coal bin was furnished a considerable time after the furnishing of the great bulk of the material, where it was furnished in good faith, and the owner signed the ticket acknowledging delivery, a lien filed in seasonable time thereafter is valid, since requisitions are made as material is needed, and such requisitions do not make new contracts. *Id.*

MEDICAL TESTIMONY—See INSURANCE (10)

MEETING OF MINDS—See MISTAKE (2).

MENTAL CAPACITY—See CRIMINAL LAW (54, 55, 58, 59).

MERCANTILE BUILDINGS—See COVENANTS (2).

MERCHANTABLE TITLE—See ATTORNEY AND CLIENT.

MERITS OF SYSTEM OF HEALING QUESTION FOR LEGISLATURE—See CRIMINAL LAW (49).

MICHIGAN STANDARD POLICY—See INSURANCE (3).

MISCARRIAGE OF JUSTICE—See CRIMINAL LAW (18); HOMICIDE (10).

MISCONDUCT OF COUNSEL—See INTOXICATING LIQUORS (2).

MISTAKE.

1. Ordinarily, in order to entitle a party to relief by way of reformation of a contract on the ground of mistake, it must appear to have been mutual. *Baas* v. *Zinke*, 552.

2. A mistake of one party of such a character that the minds of the parties cannot be said to have met, if clearly established, is ground for rescission, in equity. *Id.*

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MISTAKE—Continued.

3. Where plaintiff's claim that he signed said agreement under a mistake is largely based upon the allegation that it was not read over to or understood by him, but the record is very convincing that said agreement and conveyances were all read over and carefully explained to him by the attorney who drew them, and it is not apparent from the proofs that any advantage was taken of him, the decree dismissing the bill will be affirmed. *Id.*

4. A mistake, although not mutual, may, if clearly established, be ground for rescission, though not for reformation, of the agreement. *Meade* v. *Brown*, 556.

5. In a suit for the specific performance of an option to purchase contained in a lease of the premises given to plaintiff, where the defense is that such provision was inserted by mistake on the part of the scrivener, the burden of proof is on the defendants to overcome the presumption that when they signed the writing they understood its contents. *Id.*

6. Evidence on the part of defendants *held*, insufficient to meet the burden of proof. *Id.*

MONEY HAD AND RECEIVED—See ASSUMPSIT.

MORTGAGES—See EXCHANGE OF PROPERTY (3).

MOTION TO DISMISS—See APPEAL AND ERROR (11); JUSTICES OF THE PEACE (3); MANDAMUS; PLEADING (4).

MOTOR VEHICLES—See CRIMINAL LAW (31); HOMICIDE (4); NEGLIGENCE (5-8, 12-15).

MULTIPLICITY OF SUITS—See EQUITY.

MUNICIPAL CORPORATIONS.

1. In an action against a township for personal injuries alleged to have been caused by a "washout" in the highway, conflicting testimony as to the existence of said defect at the place where plaintiff was injured, *held*, to present a question for the jury. *Burns* v. *Township of Van Buren*, 40.

2. The finding of the jury that the highway was not "in a condition reasonably safe and fit for public travel," *held*, not so contrary to the great weight of the evidence as to justify setting it aside. *Id.*

3. The question as to whether plaintiff's injury was caused by her horse becoming frightened, as claimed by defendant, rather than by a defect in the highway, *held*, under the evidence, for the jury. *Id.*

4. In view of testimony that the defect in the highway had existed for two weeks, more or less, that the pathmaster made an inspection of the roads once a week, on an average, and that the highway commissioner examined the

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MUNICIPAL CORPORATIONS—Continued.

road once a month, the trial court was justified in submitting to the jury the question as to whether the township had constructive notice of the defect. *Id.*

5. Refusal to give certain requests to charge, preferred by defendant, *held*, in view of the charge taken as a whole, not reversible error. *Id.*

6. That the electors of the city of Jackson, having a home-rule charter, voted to amend the charter in respect to issuing bonds for a specific purpose, and at the same election voted authority to the city commission to issue the specific bonds thereunder, would not render the bonds invalid, since it is the issuance of the bonds, and not the vote of the electorate authorizing same, which creates the liability against the municipality, and it is immaterial that, at the time the commission took the preliminary steps to submit the question to the people, authority to issue the bonds was lacking. *City Com'n of Jackson* v. *Vedder*, 292.

7. The streets of a city belong to the public, and for ordinary use and general transportation and traffic they are free and common to all, and any control sought to be exercised over them by the city must be such as will not defeat or seriously interfere with their enjoyment, but common carriers have no right to such use for private gain without the consent of the city. *Melconian* v. *City of Grand Rapids*, 397.

8. The distinction between the use of streets by the public in the usual way for pleasure or business and as a place or instrumentality for business for private gain is fundamental, and while, as to the former, the power to regulate must be sparingly exercised and only when necessary in the public interest, as to the latter the right to use may be given or withheld. *Id.*

9. The only restriction on the control which a city may exercise over its streets under the constitutional provision (Art. 8, § 26) is that it must be reasonable. *Id.*

10. While the authority to grant a license must be conferred upon some person, body, or commission, when the regulation affects private rights, it is a general rule that the requirements for obtaining a license must be so specifically pointed out in the ordinance as to permit all applicants who comply therewith to secure a license as a matter of right, and that an arbitrary discretion to grant or refuse may not be conferred, but in cases where the public health or safety is involved, this rule has been relaxed and a provision conferring discretionary power has been sustained. *Id.* 398.

11. The provisions in section 2 of an ordinance of the city of Grand Rapids regulating the operation of taxicabs in said city, making it unlawful to operate a taxicab on the streets of the city without first obtaining a license to do

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MUNICIPAL CORPORATIONS—Continued.

so, requiring applications on a form provided by the city clerk containing certain information, providing that all applications should be investigated by the city manager who should report same to the city commission with his recommendation, and "if in the opinion of the city commission the person making the application is a proper person, both by experience and character, they may authorize the granting of a license," etc., *held*, within the power conferred on the city under article 8, § 28, of the Constitution, and therefore valid. *Id.*

12. Section 4 of said ordinance providing for the granting of permits to drivers of such licensed taxicabs, *held*, valid. *Id.*

13. The criticism of counsel that section 2 does not provide that the information secured by the city manager shall be communicated by him to the commission is overtechnical, since the reference of the application to him is for the very purpose of securing information on which the commission may act, it being necessary for the exercise of a wise discretion, and it cannot be doubted that the commission would require him to lay before it the information on which his recommendation is based, and, therefore, it may fairly be said that he is required to do so. *Id.*

14. The provision in section 3 fixing the annual license fees at $25 for the first taxicab and $10 for each other is not open to the objection that said fees are so large as to be unjust, unreasonable, and discriminatory, and that they are for the purpose of revenue rather than for the purpose of regulation, since the fees may include cost of issuing license, inspection, expense incident to reasonable supervision, and also any other cost the city may be subjected to by reason of the use of the streets for the purpose permitted. *Id.* 399.

15. The intent to limit to the owner or driver of the taxicab the provision in subsection *b* of section 5, making it unlawful for any person "to procure or transport or to aid or abet in the procuring or transporting of any intoxicating liquor," *held*, not so clearly expressed as to permit its enforcement as a penal provision. *Id.*

16. The provision in subsection *c* of section 5, making it unlawful "to allow women in any taxicab while the same is at any stand or upon any street waiting for customers," *held*, so clearly an invasion of private rights as to render it void. *Id.*

17. The requirement of an indemnity bond of $5,000, under subsection *f* of section 5, *held*, within the power of the city authorities. *Id.*

18. Section 14, providing for the punishment of any person refusing to pay his fare after having received the service,

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MUNICIPAL CORPORATIONS—Continued.

not being limited to cases of fraud or breach of trust within the exception in article 2, § 20, of the Constitution prohibiting imprisonment for debt, is in conflict therewith, and therefore void. *Id.*

19. The maximum penalty provided in section 18 for violations of the ordinance, viz., $500 fine and imprisonment in the county jail not to exceed 90 days, is within the limit permitted by the statute (1 Comp. Laws 1915, § 3307, subd. *e*), and is not open to the objection that it is unreasonable; but the imposition of costs of prosecution is unauthorized by said statute and is therefore void. *Id.* 400.

20. The objection that the title of the ordinance is defective because the provision of a penalty for its violation contained in section 18 is not included therein, is not tenable, the constitutional provisions relating to the title of laws passed by the legislature having no application to ordinances enacted by the common council of a city. *Id.*

21. The sections or parts of sections of the ordinance which are herein held invalid, being distinctly separable, the remainder, which constitute in themselves a complete enactment, are valid and enforceable. *Id.*

22. The burden of proof rests upon plaintiff, in an action on a claim against a municipality, to show compliance with the charter requiring presentation of claim to the common council for audit and allowance as a prerequisite to bringing action. *Moulthrop* v. *City of Detroit*, 464.

23. A superfluous special notice admitting that petition with affidavit attached was filed with the common council, but charging it was not in accordance with requirements of the charter, is not an admission that the mandatory provision of the charter had been complied with. *Id.*

24. In an action against the city of Detroit, where it was neither alleged in the declaration nor shown by plaintiff's proofs that his claim for damages to a leased building had been presented to the common council of the city for audit, etc., as required by the charter, defendant was entitled to a directed verdict. *Id.*

See ELECTRICITY; HIGHWAYS AND STREETS; QUO WARRANTO.

MURDER—See CRIMINAL LAW (14, 15).

MURDER WITH INTENT TO RAPE—See HOMICIDE (1-3).

MUTUAL MISTAKE—See MISTAKE (1, 4).

NEGLIGENCE.

1. In an action by a tenant against its landlord for damages to its property caused by the falling of a water tank, due to the accumulation thereon of ice, instructions by the trial court that if the tank had become in such condition by an accumulation of ice upon it as to be a liability

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NEGLIGENCE—Continued.

of the destruction or falling of the tank, the employing of independent contractors to remove the ice would not relieve the defendants, and that if the formation of the ice on the tank was due to defendant's negligence, the fact that its falling was due to the unskilful manner in which said contractors performed their work would not relieve defendant of liability, *held*, proper; since the doctrine of "independent contractor" has no application. *Van Dam* v. *Doty-Salisbury Co.*, 32.

2. Defendant's claim that it was entitled to a directed verdict because, under the proofs, the fall of the tank was the result of unknown extraordinary causes which the defendant by the exercise of ordinary care and skill could not have avoided, *held*, not sustained by the record, which contains abundant testimony to support the finding of the jury that defendant was negligent. *Id.*

3. In an action for personal injuries due to a fall, alleged to have been caused by a hole in a rug in defendant's public place of business, evidence of defendant's negligence, *held*, sufficient to present a question for the jury. *Yarington* v. *Huck*, 100.

4. In an action for damages to plaintiffs' property caused by defendants' threshing machine engine, the admission of testimony tending to show that the engine had set other fires, *held*, not error. *Sabin* v. *Southard*, 227.

5. Whether a boy, 12 years of age, sitting on the left side of a street car, who sustained an injury to his left arm by a passing truck, was guilty of contributory negligence in resting his arm upon a window sill with some part of the arm protruding outside of the window, *held*, under the circumstances of the case, a question of fact for the jury. *Kutchai* v. *Moreton*, 242.

6. The negligence of the master, in driving, is not, as a matter of law, imputable to the servant riding with the master in the course of his employment, where the servant did not participate in the driving or degree of care exercised. *Robertson* v. *United Fuel & Supply Co.*, 272.

7. In an action for personal injuries caused to plaintiff at a street intersection by defendant's automobile, where a reading of the record is convincing that plaintiff was unmindful of her surroundings in a busy section of the city, that she failed to use the care that should have been exercised by an ordinarily prudent person, and was therefore guilty of contributory negligence, the judgment in her favor will be reversed. *Steele* v. *Hamilton*, 522.

8. In an action against R. and B., as individuals and as doing business as a company, for personal injuries caused by an automobile driven by R., but alleged to be owned by defendants and operated in their business, the burden of proof is upon plaintiff to show the liability of B. *Collard* v. *Ronis*, 547.

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NEGLIGENCE—Continued.

9. Where the only testimony connecting B. with the ownership or operation of the car was the testimony of plaintiff's brother that B. said R. was working for him, which statement B. denied, and both B. and R. testified that R. was not in B.'s employ, and R. further testified that he was the owner of the car and the license was in his name, a verdict against B. is *held*, to be against the great weight of the evidence. *Id.*

10. In an action for damages to plaintiff's brick building, alleged to have been caused by a 6,000-pound hammer in defendant's factory across the street jarring the ground and causing a vibration resulting in the damage alleged, a verdict for plaintiff, *held*, not against the great weight of the evidence. *Rucklich* v. *American Car & Foundry Co.*, 561.

11. A verdict for $2,500 cannot be said to be excessive, in view of the testimony of the architect of the building that he had examined it, and his estimate of the cost of repairing it exceeded $3,000. *Id.*

12. In an action for personal injuries to an infant 4 years and 4 months old, caused by being struck by a taxicab upon a public street, a witness who had observed moving objects, had driven a horse and wagon for 12 years, had ridden in automobiles, had observed their speed and watched the speedometer, was competent to testify as to the rate of speed at which the taxicab was approaching, which he saw when it was 40 feet away. *Jones* v. *Detroit Taxicab & Transfer Co.*, 673.

13. Certified copies from the office of the secretary of State of the application for, and issuance to the defendant, as owner, of the distinctive number of the license plate upon the taxicab was sufficient to establish ownership *prima facie*. *Id.*

14. Cross-examination of the driver of the taxicab, in which he admitted he had been discharged for overcharging customers but denied that there were other causes, *held*, not improper, since the questions asked affected the credibility of the witness and the examination was kept within reasonable bounds by the trial judge. *Id.*

15. In an action for the death of plaintiff's decedent by being struck by defendant's taxicab, testimony that decedent was struck while alighting from a street car or while still on the car preparing to alight, *held*, to preclude a directed verdict for defendant on the ground of decedent's contributory negligence, although said testimony was out of accord with all the other testimony in the case, since its weight was for the jury. *Quinn* v. *Bradley*, 682.

See CARRIERS; CUSTOMS AND USAGES; MASTER AND SERVANT (17, 20, 23-26); MUNICIPAL CORPORATIONS (1); PLEADING (1, 2); RAILROADS (6-10); STREET RAILWAYS.

NEGOTIABLE INSTRUMENTS—See JUDGMENT (9).

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NEGROES—See COVENANTS (4).

NEW TRIAL.

1. The conclusion of the trial court that the verdict was not against the overwhelming weight of the evidence, *held*, supported by the record. *Fox* v. *Detroit United Ry.*, 5.

2. Motion for new trial, *held*, properly denied. *People* v. *Best*, 142.

See APPEAL AND ERROR (5, 8); CRIMINAL LAW (29, 30); HOMICIDE (9); JUDGMENT (7, 8); MASTER AND SERVANT (28); MUNICIPAL CORPORATIONS (2); NEGLIGENCE (9, 10); TRIAL (4).

NON OBSTANTE VEREDICTO—See JUDGMENT (3, 4, 8).

NOTICE—See ADVERSE POSSESSION (4); CUSTOMS AND USAGES; FRAUD (2); JUDGMENT (6); LANDLORD AND TENANT; MASTER AND SERVANT (26, 28); MECHANICS' LIENS (1); MUNICIPAL CORPORATIONS (4); SALES (5); TRIAL (6); VENDOR AND PURCHASER (3).

NUISANCES.

Where a proposed filling station was not yet erected, and the state of the proofs was such that it was not ascertainable therefrom whether such structure, when erected, would become a nuisance, the decree of the court below properly left such question open to further litigation should it be deemed necessary hereafter. *Henry* v. *Sinclair*, 297.

OFFER AND ACCEPTANCE—See MASTER AND SERVANT (29).

OFFER TO RETURN—See SALES (4).

OFFICERS AND MEMBERS OF CORPORATION—See CORPORATIONS (2, 3).

OLD AGE—See EVIDENCE (6); MASTER AND SERVANT (11).

OPTION TO PURCHASE—See MISTAKE (5).

ORDINANCES—See CRIMINAL LAW (51); DISORDERLY HOUSES; ELECTRICITY; MUNICIPAL CORPORATIONS (11-21); STREET RAILWAYS (4).

ORIGINAL STATUTE UNAFFECTED BY VOID AMENDMENT—See CRIMINAL LAW (48).

OTHER OFFENSES—See CRIMINAL LAW (38, 46); RAPE (5).

PAROL EVIDENCE—See INSURANCE (13).

PAROL TESTIMONY—See CRIMINAL LAW (36); EVIDENCE (2).

PARTICIPANT IN FRAUD COULD NOT BE INNOCENT PURCHASER OF FRUIT THEREOF—See EXCHANGE OF PROPERTY (3).

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PARTIES—See BANKS AND BANKING (4); CANCELLATION OF INSTRUMENTS (3); HOMESTEADS (1); INSURANCE (2); QUO WARRANTO (1, 2); VENDOR AND PURCHASER (11).

PARTNERSHIP.

1. A policy of insurance on partnership property taken by the partners in their individual names was not void although they had not complied with either Act No. 101, Pub. Acts 1907 (2 Comp. Laws 1915, § 6349 *et seq.*), or Act No. 164, Pub. Acts 1913 (2 Comp. Laws 1915, § 6354 *et seq.*), requiring filing of certificate of copartnership. *Aromo* v. *Fire Ass'n of Philadelphia*, 203.

2. Where a partner accepted a give or take proposition made by his copartner, and later discovered that he had been defrauded by the failure of his copartner to account for all the profits of the partnership previous to the sale, his affirmance of the sale to himself affirmed the dissolution of the copartnership, and his remedy for the fraud is an action at law and not by bill in equity for an accounting. *French* v. *Mulholland*, 248.

PAYMENT.

In a suit to enjoin the foreclosure of a mortgage, positive testimony by plaintiffs that payments represented by written receipts given to them by defendant were actually made, *held*, sufficient to sustain a decree in their favor; defendant failing to sustain the burden of proof to support its claim that one of the receipts given to plaintiffs included amounts represented by previous receipts. *Gasta* v. *Farmers State Savings Bank*, 106.

PENALTY—See MUNICIPAL CORPORATIONS (19, 20).

PENALTY FOR OFFENSE NO CONCERN OF JURY—See INTOXICATING LIQUORS (4).

PERFORMANCE—See SALES (4).

PERMISSIVE POSSESSION—See ADVERSE POSSESSION (2).

PERSONAL INJURIES—See APPEAL AND ERROR (3); CARRIERS; DAMAGES (1); JUDGMENT (4); MASTER AND SERVANT (5); MUNICIPAL CORPORATIONS (1); NEGLIGENCE (3, 5-9, 12); PLEADING (2); RAILROADS (6); STREET RAILWAYS (1, 5, 7).

PHYSICAL TENDER UNNECESSARY WHERE IDLE CEREMONY—See SALES (3).

PHYSICIANS AND SURGEONS—See CRIMINAL LAW (47, 50); EVIDENCE (7); INSURANCE (8).

PLEADING.

1. Where a pleader is confronted with an uncertainty as to which of two defendants concerned in an accident occasioning injury to plaintiff should be charged to respond in damages, he may charge both defendants, but should

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PLEADING—Continued.

employ separate counts, and any inconsistency in doing so is saved from defeating his action by Circuit Court Rule No. 27, § 7; but the pleader should intimate the uncertainty leading him to employ counts inconsistent in their statements. *Robertson* v. *United Fuel & Supply Co.*, 271.

2. Where plaintiff pleaded inconsistent counts against his employer and another, in an action for personal injuries, the trial court was in error in directing a verdict in favor of the other defendant on the ground that the count against the employer was an admission of negligence on the part of the employer, who was driving the car in which plaintiff was riding when injured, which was imputable to plaintiff; nor was said error cured by a verdict subsequently rendered against the employer. *Id.*

3. Although plaintiff proceeded against his employer alone and recovered judgment, he did not thereby waive his right to have a review of the judgment of the trial court discharging the other defendant. *Id.* 272.

4. The practice of filing an answer denying the material allegations of the bill, and then nearly two months later filing a motion to dismiss is not approved; the better practice being to file the motion to dismiss before or with the answer. *Komarynski* v. *Popovich*, 481.

See EXCHANGE OF PROPERTY (2); MUNICIPAL CORPORATIONS (23); RAILROADS (9); SALES (5, 9); SPECIFIC PERFORMANCE (4); TRIAL (3).

POLICE POWER—See MUNICIPAL CORPORATIONS (10); RAILROADS (4).

POSSESSION—See VENDOR AND PURCHASER (3-9).

POWER OF INDUSTRIAL ACCIDENT BOARD—See MASTER AND SERVANT (2, 10).

POWER OF PUBLIC UTILITIES COMMISSION—See RAILROADS (1-5).

POWER OF SUPREME COURT ON REVIEW—See MASTER AND SERVANT (4).

PRACTICE—See APPEAL AND ERROR (11, 13); JUDGMENT (5, 6); MANDAMUS; PLEADING (4); TRIAL (12).

PRACTICE OF MEDICINE—See CRIMINAL LAW (47-50).

PREMATURE SUIT—See NUISANCES.

PRESCRIPTIVE RIGHTS AGAINST VILLAGE—See HIGHWAYS AND STREETS (2).

PRESUMPTIONS—See CRIMINAL LAW (53, 55); FRAUD (7); MISTAKE (5).

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PRINCIPAL AND AGENT—See EVIDENCE (5, 8, 9); FRAUD (2); INSURANCE (6); MASTER AND SERVANT (16); VENDOR AND PURCHASER (2).

PRINCIPAL AND SURETY.

Where stock of a certain company was issued to plaintiff redeemable at par on February 1, 1915, and the payment of the principal and dividends at said date was guaranteed by two persons with the condition that if the holder of the stock desired to continue it beyond the maturity date notice to that effect was to be given to them at least 60 days prior to that time, and plaintiff failed to give such notice but continued to hold said stock until August 1, 1916, when all payments stopped because of the bankruptcy of the company, the guarantors were not liable, in an action on their guaranty, because of the failure of the plaintiff to give said notice. *Metz* v. *Corl's Estate*, 509.

PRIVATE RIGHTS—See MUNICIPAL CORPORATIONS (16).

PROCESS—See MECHANICS' LIENS (1).

PRODUCTION OF INCRIMINATING EVIDENCE CANNOT BE REQUIRED—See DISCOVERY (5).

PRODUCTION OF IRRELEVANT PAPERS NOT NECESSARY—See DISCOVERY (2).

PRODUCTION OF ORIGINAL WILL NOT NECESSARY—See DISCOVERY (4).

PRODUCTION OF TRUSTEES' BOOKS MAY BE REQUIRED—See DISCOVERY (6).

PROOF OF LOSS—See INSURANCE (6, 14).

PROSTITUTES.

Prostitutes are defined as disorderly persons by statute (2 Comp. Laws 1915, § 7774). *People* v. *Thrine*, 688.

See DISORDERLY HOUSES.

PROXIMATE CAUSE—See MUNICIPAL CORPORATIONS (3).

PUBLIC RECORDS—See CRIMINAL LAW (36); NEGLIGENCE (13).

PURCHASER IN DUE COURSE—See EXCHANGE OF PROPERTY (3).

QUESTION FOR JURY—See CORPORATIONS (4); MASTER AND SERVANT (30).

QUO WARRANTO.

1. A proceeding in the nature of *quo warranto*, under 3 Comp. Laws 1915, §§ 13551-13553, to test the validity of the election by which a rural agricultural school district was established and defendants elected trustees, should have been brought within 30 days after the election against

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QUO WARRANTO—Continued.

the school district and not against the trustees as individuals. *Youells* v. *Morrish*, 194.

2. More than 30 days having elapsed after the election, the trial judge properly refused an amendment making the school district a party, since, to have permitted the amendment would have allowed plaintiff to do by indirection what the statute inhibited him from doing directly. *Id.* 195.

3. Petition in the nature of *quo warranto* under 3 Comp. Laws 1915, §§ 13551-13553, to test the validity of the establishment of a township school district pursuant to 2 Comp. Laws 1915, § 5909 *et seq.*, must be filed within 30 days after the election. *Anderson* v. *Levin*, 225.

See RELIGIOUS SOCIETIES.

RAILROADS.

1. The power of approval of the "manner" in which the tracks of one railroad company cross the tracks of another, given the public utilities commission by 2 Comp. Laws 1915, § 8365, has reference to the way, method, or mode of installing or repairing the physical crossing, and has no reference to an apportionment of the future expense of maintaining said crossing. *Pere Marquette R. Co.* v. *Michigan Public Utilities Com'n*, 307.

2. Under 2 Comp. Laws 1915, § 8369, providing for apportioning the expense of maintaining crossings already in existence, where the tracks of one railroad company cross the tracks of another, but making no provision for maintaining crossings subsequently made, it must be taken that the legislature, either purposely or inadvertently, left the matter of expense of installing and maintaining them to rest upon the company for whose benefit the crossing is made, in accordance with the common law. *Id.*

3. While the right to use a public street gives to a street railway company the right to cross a steam railroad company's tracks without compensation, such right does not operate as an occasion for casting upon the steam railroad company a part of the expense of installing or maintaining the necessary crossing frogs, but the whole expense should be borne by the street railway company. *Id.*

4. Although the public utilities commission under the provisions of 2 Comp. Laws 1915, § 8152, has power to order the installation of a new crossing frog to take the place of a defective one, in the interest of public safety, it has no power to apportion the expense of same, or compel the company whose tracks are crossed to bear part of said expense. *Id.*

5. On certiorari to review an order of the public utilities commission approving the crossing of the tracks of certain steam railroad companies by the tracks of a street railway company and apportioning the expense of "the

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RAILROADS—Continued.

maintenance and renewals of the crossing frogs" share and share alike to the "companies whose tracks are crossed," the order approving the crossing is affirmed, but reversed as to the apportionment of the expense of renewals of crossing frogs, which, under the decision in *Pere Marquette R. Co.* v. *Michigan Public Utilities Commission*, 218 Mich. 307, should be wholly borne by the street railway company. *Michigan Air Line Ry.* v. *Michigan Public Utilities Com'n*, 320.

6. In an action for personal injuries caused to plaintiff when he was struck at a street crossing by defendant's locomotive, testimony that when plaintiff entered upon the track the engine was 176 feet away, running at the rate of 12 miles an hour, and that plaintiff's foot was caught in the defective planking preventing his escape, *held*, to justify submission to the jury of the question of defendant's gross or subsequent negligence, although there was contradictory testimony to the effect that the engine was only "seven steps" distant when he entered upon the track; the weight of the testimony being for the jury. *Goonen* v. *Ann Arbor R. Co.*, 502.

7. If defendant is chargeable with subsequent negligence, the fact that plaintiff's danger arose in the first instance because of his own negligence does not prevent his recovery. *Id.*

8. It cannot be said, as a matter of law, that plaintiff was guilty of contributory negligence in attempting to walk across a track in front of a train 176 feet distant approaching at the rate of 12 miles an hour. *Id.*

9. An averment of negligence in the declaration "that the planking between the rails of said tracks was so laid that a pedestrian could have his feet caught between the rails and said planking," *held*, sufficient to aver defective construction of the crossing. *Id.*

10. Evidence as to said defective crossing, while not positive and lacking in detail, *held*, sufficient from which the jury might infer defective construction and consequent negligence of defendant. *Id.*

See MASTER AND SERVANT (17, 18, 20, 23).

RAPE.

1. In a prosecution for statutory rape, proof of the intent goes with proof of the act of sexual intercourse with a girl under the age of consent. *People* v. *Gengels*, 633.

2. Proof of consent is no defense, where the girl is under the statutory age, since she is legally incapable of consenting. *Id.*

3. Nor is it any defense that the accused believed from the statement of the girl or others that she had reached the age of consent. *Id.*

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RAPE—Continued.

4. In a prosecution for statutory rape, proof of other acts of intercourse between the prosecutrix and accused is permissible only for the purpose of showing opportunity, disposition of the parties, and intimate relations tending to break down self-respect and modesty. *Id.*

5. It was error for the prosecutor to assert, and attempt to prove, another rape by accused upon another girl at a different time, having no connection with the crime charged, claiming that it was admissible by way of impeachment. *Id.*

See CRIMINAL LAW (39-46).

RATE OF SPEED—See NEGLIGENCE (12).

RATES—See ELECTRICITY.

REAL PARTY IN INTEREST—See INSURANCE (2).

REASONABLE TIME—See SALES (10).

REBUTTAL—See CRIMINAL LAW (6, 55).

RECEIPTS—See PAYMENT.

REFORMATION OF INSTRUMENTS—See MISTAKE.

REGULATION—See MUNICIPAL CORPORATIONS (7-21).

REGULATION AFFECTING PRIVATE RIGHTS MAY NOT BE ARBITRARY—See MUNICIPAL CORPORATIONS (10).

REGULATION MUST BE REASONABLE—See MUNICIPAL CORPORATIONS (9).

REHEARING—See JUDGMENT (5, 6).

RELIGIOUS SOCIETIES.

Allegations in a bill filed by plaintiffs claiming to be the lawful trustees of a religious corporation, praying to be so adjudged, and to be put in possession of the church property and records now in possession of defendants who also claim to be the lawful trustees, *held*, to state a case within the jurisdiction of a court of equity, and plaintiffs' remedy is not limited to *quo warranto* proceedings to try the title to the office of trustee, since there is something besides title to office involved. *Komarynski* v. *Popovich*, 481.

RENTAL VALUE—See VENDOR AND PURCHASER (8, 9).

REPORT OF PSYCHOPATHIC CLINIC—See CRIMINAL LAW (54).

REPUTATION—See CRIMINAL LAW (17, 22-24).

REQUESTED INSTRUCTIONS—See CRIMINAL LAW (44); MUNICIPAL CORPORATIONS (5); TRIAL (1).

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REQUISITIONS FOR MATERIAL NOT SEPARATE CONTRACTS—See MECHANICS' LIENS (3).

RES ADJUDICATA—See JUDGMENT (1, 2); MASTER AND SERVANT (10).

RESCISSION—See EXCHANGE OF PROPERTY (1, 2); MISTAKE (2, 4); SALES (1-4).

RESERVATIONS—See EASEMENTS (1).

RESTRICTION AGAINST COLORED PEOPLE—See COVENANTS (4).

RETURN DAY—See EXECUTION.

REVIEW—See APPEAL AND ERROR (1).

RIGHT OF ACTION—See BANKS AND BANKING (3); CONTRACTS (4); INSURANCE (3, 5).

RIGHT OF INSURER TO MAINTAIN ACTION AGAINST WRONGDOER IN OWN NAME—See MASTER AND SERVANT (21).

RIGHT OF POSSESSION—See RELIGIOUS SOCIETIES.

RIGHT OF PROSECUTING OFFICERS TO DETERMINE APPLICABLE STATUTE—See CRIMINAL LAW (52).

RIGHT OF WAY—See EASEMENTS.

RIGHT TO CONVEY PROPERTY—See DEEDS (5).

RIGHT TO USE OF STREET—See STREET RAILWAYS (1).

RIGHTS OF OWNER OF LAND NOT A PARTY TO SUIT NOT CUT OFF—See VENDOR AND PURCHASER (11).

ROBBERY WHILE ARMED—See CRIMINAL LAW (27, 29).

SALES.

1. Where plaintiff claimed that defendant sold to him a new automobile but instead delivered to him a second-hand one, in order for plaintiff to recover under the uniform sales act (3 Comp. Laws 1915, § 11900) for breach of warranty, he must have returned or offered to return the car received within a reasonable time and in substantially as good condition as when it was delivered to him, unless the deterioration or injury was due to the breach of warranty complained of. *Kawecki* v. *Stuber-Stone Co.*, 25.

2. Testimony on the part of plaintiff *held*, sufficient to establish the fact that as soon as plaintiff was satisfied that the car delivered to him was a used car he offered to return it and demanded payment back of what he had paid on the purchase price. *Id.*

3. Where, when the offer to return the car was made by plaintiff, defendant denied that it was a used car but in-

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SALES—Continued.

sisted that it was a new one, the physical tender back of the car is *held*, to have been unnecessary as an idle ceremony. *Id.*

4. Although plaintiff used the car for some time in his business, where there was no evidence that he misused it, and such use and consequent deterioration were due to the fraudulent action of defendant in selling him a used car for a new one, and he offered to return it as soon as he discovered the fraud, the offer to return was timely. *Id.*

5. Refusal of defendant's offer of proof as to what the use of the car was worth to plaintiff in his business, where the plea was the general issue with no notice of set-off, *held*, not error. *Id.*

6. Instruction by the trial court that plaintiff was entitled to recover the amount he had paid and the price agreed upon as the value of a used car he turned in, *held*, not erroneous, being in conformity with the rule fixed in the uniform sales act (3 Comp. Laws 1915, § 11900). *Id.* 26.

7. Defendant's complaint that it should have been permitted to show the real value of the car turned in by plaintiff, and that the value agreed upon was a trading value, *held*, without merit, where the record fails to show offer of such proof. *Id.*

8. Defendant's complaint of prejudicial remarks by the trial court, and that the charge to the jury was "inconsistent, ambiguous, prejudicial to the defendant and misleading to the jury," *held*, not sustained by the record. *Id.*

9. In an action for the purchase price of a car load of wheat, where defendant admitted receiving the wheat but claimed that the original contract was canceled and the wheat received to be disposed of on commission, which was disputed by plaintiff, the issue as to whether the wheat was received under the original contract or under a substituted one was properly submitted to the jury. *The Jennings Farms* v. *Watson-Higgins Milling Co.*, 65.

10. Where plaintiff purchased three car loads of newspapers on July 30th without specifying date of delivery, and the first car was shipped on September 28th, which was accepted by defendant and paid for on October 18th, when he inquired how soon the other two cars would be shipped, their shipment on October 26th and 29th respectively, *held*, to be within a reasonable time, in view of the correspondence between the parties. *Brenner* v. *Feinburg*, 92.

11. Although overcoats delivered to defendant were not the kind ordered, and were not delivered within the specified time, defendant is liable, in an action for the purchase price, where, without consent of the seller, he altered some of them and attempted to sell them, since he thereby waived strict performance of the contract. *Symons* v. *Greenwood, Atkinson, Armstrong Co.*, 621.

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SAVING QUESTION FOR REVIEW—See APPEAL AND ERROR (11, 12).

SCHOOLS AND SCHOOL DISTRICTS—See QUO WARRANTO.

SEARCH WARRANT—See INTOXICATING LIQUORS (10, 11).

SELF-SERVING STATEMENTS—See CRIMINAL LAW (32-35).

SEPTIC POISONING—See INSURANCE (8).

SERVICE STATIONS—See COVENANTS (2); HIGHWAYS AND STREETS.

SERVICES—See EVIDENCE (2).

SETTING ASIDE JUDGMENT—See JUDGMENT (8).

SIMILAR TRANSACTIONS—See CRIMINAL LAW (12).

SOCIALIST PARTY—See CORPORATIONS (3).

SPECIAL APPEAL—See APPEAL AND ERROR (10).

SPECIAL LEGISLATION NOT AFFECTED BY GENERAL—See STATUTES (3).

SPECIAL QUESTIONS—See INTOXICATING LIQUORS (9).

SPECIFIC PERFORMANCE.

1. In a suit for the specific performance of a land contract, evidence *held*, sufficient to show that plaintiff and her husband had paid a considerable sum in excess of the purchase price, and the cost of improvements and taxes paid by defendants, and therefore was entitled to a deed. *Gregor* v. *Olde*, 187.

2. While the granting of relief by specific performance rests largely in the discretion of the court, that discretion is judicial, and where a proper case is made out by the proofs such relief may not be arbitrarily refused. *Id.*

3. Where plaintiff many times asked for an accounting from defendants, which was not given her, they may not complain of her laches or invoke the doctrine of equitable estoppel because she continued to pay after paying all that she owed them. *Id.*

4. Where specific performance is not asked for, none can be granted under the allegations of a bill asking solely for damages. *Stern Co.* v. *Friedman*, 258.

See MISTAKE (5).

SPLITTING CAUSE OF ACTION—See APPEAL AND ERROR (12).

STATUTE OF LIMITATIONS—See LIMITATION OF ACTIONS; TAXATION (2).

STATUTES.

1. Plaintiff's contention that Act No. 256, Pub. Acts 1917, is unconstitutional because its title does not indicate the

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STATUTES—Continued.

purpose of abrogating the constitutional right of trial by jury is without force, since it is the contract of insurance, and not the statute, which abrogates said right. *Innis* v. *Fireman's Fund Ins. Co.*, 253.

2. The meaning of a word employed in a statute must be determined from the context, and resort, if necessary, to the lexicon. *Pere Marquette R. Co.* v. *Michigan Public Utilities Com'n*, 307.

3. Special legislation is not affected by a later statute of general application unless the legislative intent to do so is clearly apparent. *Michigan Employers Casualty Co.* v. *Doucette*, 364.

4. The requirement in the judicature act (3 Comp. Laws 1915, § 12353), a statute of general application, that actions be brought in the name of the real party in interest, does not affect the provision in the workmen's compensation act (2 Comp. Laws 1915, § 5468) conferring a right of action on the employer against the wrongdoer for the benefit of himself or his insurer so as to require action to be brought by the insurer in his own name, since the latter is special legislation, contractual in its nature, and becomes operative only in case both employer and employee elect to come under its provisions. *Id.*

See ACTION (1); APPEAL AND ERROR (4, 5, 9, 10, 14); CORPORATIONS (1, 2); CRIMINAL LAW (1, 11, 31, 41, 42, 48); DIVORCE (3); EXECUTION; HIGHWAYS AND STREETS (1, 3); HOMICIDE (1, 3, 4, 10); INJUNCTION; INSANE PERSONS; INSURANCE (1-3); INTOXICATING LIQUORS (9); JUDGMENT (3, 5, 8, 9); JUSTICES OF THE PEACE (1, 5); MASTER AND SERVANT (1, 4, 10, 17, 21, 24); MECHANICS' LIENS (1, 2); MUNICIPAL CORPORATIONS (19, 20); PARTNERSHIP (1); PROSTITUTES; QUO WARRANTO; RAILROADS (1, 2, 4); SALES (1); TAXATION.

STATUTORY RAPE—See RAPE.

STATUTORY REGULATIONS—See CORPORATIONS (2).

STREET RAILWAYS.

1. In an action for personal injuries received at a street intersection in a collision between defendant's street car and a wagon driven by plaintiff, *held*, that defendant had no greater right to the use of the street at the crossing than had plaintiff. *Fox* v. *Detroit United Ry.*, 5.

2. Where plaintiff's view to the east was entirely obstructed by defendant's standing cars, and, after waiting 5 or 6 minutes for the cars to move, and after looking and listening without detecting the approach of a car, plaintiff proceeded to cross the street, when he was struck by defendant's west-bound car, which, according to the testimony of plaintiff's witnesses, was traveling at the rate of 12 to 15 miles an hour without sounding the gong,

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STREET RAILWAYS—Continued.

the questions of plaintiff's contributory negligence and defendant's negligence were for the jury. *Id.*

3. In an action against a street railway company for personal injuries caused by a collision between plaintiff's automobile and defendant's street car at a street intersection, testimony *held*, sufficient to show negligence on the part of defendant. *Green* v. *Detroit United Ry.*, 59.

4. In view of an ordinance of the city of Detroit requiring street cars to stop at crossing on signal to take on passengers, where plaintiff approaching the crossing saw a number of persons standing in the safety zone waiting for a car, the question as to whether or not he had a right to expect that the car would stop to take on said passengers was properly submitted to the jury, as bearing upon the question of plaintiff's contributory negligence. *Id.*

5. In an action for personal injuries caused by a collision between the truck in which plaintiffs were riding and defendant's street car, at a street intersection, where there was no proof that the perilous position of the truck was known or ought to have been known to the motorman for such a time previously that he could have stopped his car and avoided the accident, there was no room for the application of the doctrine of subsequent negligence. *Wortman* v. *Detroit United Ry.*, 119.

6. A truck driver, whose view was obstructed, who approached a street intersection at such rate of speed that he was unable to stop his truck and avoid a collision after he discovered a street car approaching, was guilty of negligence as a matter of law. *Id.* 120.

7. In an action for personal injuries to a boy four years of age caused by a collision between the automobile in which he was riding and one of defendant's street cars at a street intersection, testimony supporting plaintiff's allegations that the street car was operated at a negligent rate of speed over and across the intersection, and that the motorman failed to give warning of his approach, *held*, sufficient to make it incumbent upon the trial court to submit the case to the jury, under proper instructions, no question being raised as to plaintiff's contributory negligence on account of his age. *Wickett* v. *Detroit United Ry.*, 440.

8. In an action for damages to plaintiff's automobile caused by being struck by one of defendant's cars, where it appears that when plaintiff drove out of his yard in the morning defendant's workmen had the plank crossing in front of plaintiff's premises torn up for repair, that he used a crossing a little to the north, that when he returned in the evening, nearly dark, the northerly crossing was torn out and the one opposite his premises was smooth and had the appearance of being finished, but when he got onto it he discovered one piece of planking was out, and

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STREET RAILWAYS—Continued.

his car stalled and was struck before he could get it out, it cannot be said that plaintiff was guilty of contributory negligence, as a matter of law. *Axford* v. *Detroit United Ry.*, 514.

See CARRIERS; JUDGMENT (4).

SUBROGATION—See MASTER AND SERVANT (21, 22).

SUBSEQUENT NEGLIGENCE—See STREET RAILWAYS (5).

SUMMARY PROCEEDINGS—See JUSTICES OF THE PEACE (1); VENDOR AND PURCHASER (1).

SUPPORT AND MAINTENANCE—See CANCELLATION OF INSTRUMENTS.

SUPREME COURT TAKES RECORD AS MADE IN COURT BELOW—See APPEAL AND ERROR (17).

SURETY—See PRINCIPAL AND SURETY.

TAX RECEIPTS—See ADVERSE POSSESSION (5).

TAXATION.

1. The decree of the court below for the sale of lands for taxes on petition of the auditor general was void under section 66, Act No. 206, Pub. Acts 1893, where the court remained in session only four days after the hearing of the petition and the entry of the decree. *John Widdicomb Co.* v. *Card*, 72.

2. Where neither plaintiff nor any grantor in the tax title chain entered into actual possession of land under a void tax deed, the payment of the taxes for subsequent years gave it no title by adverse possession under either the five-year or ten-year statutes of limitations (1 Comp. Laws 1915, § 4070, 3 Comp. Laws 1915, § 12311, subd. 2). *Id.*

See MUNICIPAL CORPORATIONS (14).

TAXATION OF COSTS—See APPEAL AND ERROR (1).

TAXICABS—See MUNICIPAL CORPORATIONS (7-21).

TENDER—See SALES (1-3).

THEFT INSURANCE—See INSURANCE (6).

TIME—See QUO WARRANTO; SALES (10).

TIME OF OFFENSE—See INTOXICATING LIQUORS (1).

TITLE OF ACT—See STATUTES (1).

TITLE TO OFFICE—See RELIGIOUS SOCIETIES.

TOWNSHIP SCHOOL DISTRICTS—See QUO WARRANTO.

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TRADE SECRETS—See INJUNCTION.

TRIAL.

1. Where such of defendants' requests to charge as should have been given were covered by the general charge, there was no error in refusing said requests. *Sabin* v. *Southard*, 227.

2. Where preliminary negotiations by another so dovetailed with the subsequent personal negotiations of the defendants as to make the same part of the whole transaction, the court was right in permitting the same to go to the jury. *McCulloch* v. *Von Zellen*, 278.

3. An instruction by the court, based on a conversation between defendant and one of the plaintiffs, allowing the jury to find a sale of the ties to plaintiffs at said time, although plaintiffs already claimed to own them under a contract of sale in writing, and said written contract was relied on by defendant in his special notice, *held*, reversible error. *Hughitt* v. *Sayen*, 451.

4. Where the verdict of no cause of action was more favorable to defendant than he was entitled to under his own testimony, plaintiffs' motion for a new trial should have been granted. *Id.*

5. In an action for the wrongful death of plaintiff's decedent, alleged to have been caused by defendant's recklessly driving his automobile at an excessive rate of speed directly across a well-defined safety zone in a city street, where there was ample circumstantial evidence from which the jury in balancing probabilities might fairly conclude that defendant was the driver of the car which caused the accident, the trial court was in error in directing a verdict in favor of defendant, notwithstanding his denial that he was the driver of the car and the lack of testimony positively identifying him as such. *Ricketts* v. *Froehlich*, 459.

6. The trial court was in error in refusing defendant's requested instruction, or the substance of it, that "even if you find that there was such a custom, unless you find that defendant had notice or knowledge of such custom, your verdict must be for the defendant." *Grand Rapids Bedding Co.* v. *Grand Rapids Furniture Temple Co.*, 487.

7. The granting or refusing of a request for the jury to view the premises is a matter within the discretion of the court. *Rucklich* v. *American Car & Foundry Co.*, 561.

8. Where plaintiff's counsel, in the absence of the jury, requested the court to permit the jury to view the premises, to which request defendant's counsel objected, and later plaintiff's counsel called the court's attention to this request in the presence of the jury, and the court stated that he had "quite a well-settled rule" not to send a jury to view the premises unless by consent of counsel, and defendant's counsel said he was willing to leave it to the discretion of the court, and the court then denied the

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TRIAL—Continued.

request, it cannot be said that the jury understood that defendant's counsel was the one that prevented them from viewing the premises, and defendant was so prejudiced thereby as to require reversal of the case. *Id.*

9. In view of the explicit instructions of the court to the jury on the question of damages, it cannot be assumed that their verdict was not founded on the proofs submitted to them because they may have read or heard read a newspaper report which stated that the verdict on a former trial was for $2,800. *Id.* 562.

10. An offer by plaintiff's counsel to testify to certain statements made by defendant's servant in charge of the hammer, rejected, after colloquy between court and counsel, on objection of defendant's counsel, cannot be said to have prejudiced defendant, in the absence of anything in the record indicating that said offer was made with any intent to do so; the test being as to whether counsel was intentionally seeking to inject into the record facts not competent as proof for the purpose of creating a prejudice in the minds of the jury and whether the jury were probably influenced thereby. *Id.*

11. Where plaintiff's offer to show the effect of the jarring caused by defendant's hammer on a house in the neighborhood was withdrawn on objection of defendant's counsel, the latter may not complain because like testimony offered by him after plaintiff had closed his case was rejected on objection of plaintiff's counsel, since counsel may not object to a certain line of testimony, and, after securing its exclusion or withdrawal, produce similar testimony on his client's behalf. *Id.*

12. Defendant's motion for a directed verdict in the first case because of the pendency of the second one was properly denied, since plaintiff might sue on such items of the account as it chose, and the only matter which could be considered was its right to recover on the claim presented by its bill of particulars. *General Electrical Engineering Co.* v. *Brumm*, 571.

13. Argument of counsel as to what he believes the law applicable to the case to be is not reversible error, although he may be mistaken, where the argument is made in good faith, since the court, in its charge to the jury, should correct the error, and truly state the law upon the point. *Jones* v. *Detroit Taxicab & Transfer Co.*, 673.

See APPEAL AND ERROR (2); CRIMINAL LAW (2, 9, 13, 16, 17, 20, 21, 26-28, 39, 40, 42, 44, 53, 56, 58, 59); FRAUD (4); HOMICIDE (1, 3); INTOXICATING LIQUORS (1, 2, 4, 8); MUNICIPAL CORPORATIONS (5); NEGLIGENCE (1); PLEADING (2); STREET RAILWAYS (7); SALES (8, 9).

TRIAL BY COURT WITHOUT JURY—See APPEAL AND ERROR (9).

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TRUST DEEDS—See FRAUD (5, 6).

TRUSTS—See DEEDS (7).

UNDUE INFLUENCE—See DEEDS (1, 3, 7); WILLS (1, 2).

UNIFORM SALES ACT—See SALES (1, 6).

VACATING DECREE—See JUDGMENT (5).

VALIDITY—See DEEDS (2).

VARIANCE—See HOMICIDE (5); INTOXICATING LIQUORS (1).

VENDOR AND PURCHASER.

1. In a suit to enjoin defendants from evicting plaintiff from certain premises which he was purchasing on a land contract, to have a circuit court commissioner's judgment for restitution of said premises set aside, and to have plaintiff's right in said premises determined, the finding of the court below that the judgment of restitution and the statement of the amount due upon the contract were obtained by fraud, and therefore should be set aside, *held*, sustained by the record, and the case is remanded for further proofs as to the state of the account between the parties unless counsel agree thereon. *Nowatarski* v. *Dusza*, 443.

2. In a suit for the foreclosure of a land contract, where, in the consummation of the contract, defendant dealt with a real estate agent without having any direct dealings with the vendors, evidence *held*, insufficient to establish that said agent acted exclusively as the agent of defendant. *Sanders* v. *Detlaff*, 471.

3. A covenant in a land contract to give the purchaser possession at its date is binding upon the vendors and creates a liability for its breach even if the purchaser knew there was a tenant upon the property, since he had a right to assume, when the contract was made, that the vendors could and would give him possession according to its terms. *Id.*

4. Vendor's contention that they absolved themselves from liability by tendering, on delivery of the contract, an assignment of the lease to the purchaser with a check for rent collected after the date of the contract and a letter directing the tenant to attorn to the new landlord comes too late, where, on refusal of the purchaser to accept said assignment and demand by him for possession, vendors took steps to comply therewith and gave him belated possession. *Id.*

5. Subsequent removal of the obstructing incumbrance and putting the purchaser in possession would not extinguish the right of action or relieve from liability for damages resulting from being kept out of possession in the meantime. *Id.*

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VENDOR AND PURCHASER—Continued.

6. A contract to sell with deferred payments, and silent as to possession, does not give the purchaser right of possession until full and final payment is made. *Id.* 472.

7. The measure of damages for breach of covenant for possession resulting from an unexpired lease on the premises has usually been held, in the absence of special circumstances, to be the fair rental value of the property during the time the purchaser is kept out of possession. *Id.*

8. While the rent actually being paid under the lease for the land for farm purposes was competent evidence, it was not necessarily conclusive as to the actual rental value, especially where it was immediately available for manufacturing purposes and was bought and sold on that basis. *Id*

9. Where there was testimony that the fair rental value was the interest on the purchase price for the time the purchaser was deprived of possession, which is also in accord with the general rule, the decree of the court below awarding damages on said basis will not be disturbed on appeal. *Id.*

10. Where the agent of the owner of land executed a contract in his own name to sell same, which was left with a bank, together with a deed signed in blank by the owner, which was to be delivered to the purchaser on the payment to the bank of $350, an assignment of said contract by said agent to his wife conveyed nothing since he had nothing to convey, and the bank properly paid the money to the executor of the estate of the owner, who had died. *Roark* v. *Citizens Bank of Saline*, 611.

11. Nor could a decree in a divorce suit between said agent and his wife, giving the latter a lien upon the money paid to the bank, cut off the rights of the owner of the land or his executor, they not being parties to the suit. *Id.*

See SPECIFIC PERFORMANCE (1).

VENUE—See CRIMINAL LAW (8).

VIDELICET—See INTOXICATING LIQUORS (1).

VIEW OF PREMISES—See HOMICIDE (8); TRIAL (7, 8).

VIOLATION OF MASTER'S INSTRUCTIONS—See MASTER AND SERVANT (9).

VOID CONTRACT—See ASSUMPSIT.

WAIVER—See ELECTRICITY (2); INSURANCE (11-14); PLEADING (3); SALES (11).

WARRANTY—See SALES (1, 2).

WEIGHT OF EVIDENCE—See APPEAL AND ERROR (5); BANKS AND BANKING (2); EVIDENCE (1); MASTER AND SERVANT (28); TRIAL (4).

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WILFUL MISCONDUCT—See MASTER AND SERVANT (12).

WILLS.

1. In proceedings to contest a will on the ground of undue influence, there must be a showing of something more than mere opportunity and unequal distribution of the property, to constitute undue influence invalidating the will. *In re Carlson's Estate*, 262.

2. Testimony that testatrix had acquiesced in the expressed wish of her husband that their children should share equally in the property is insufficient proof of undue influence in the making of a will leaving the bulk of the property to one daughter with whom testatrix made her home. *Id.*

3. That testatrix was living in the home of proponent at the time of the making of the will does not establish a fiduciary relation between them militating against the bequest to proponent. *Id.*

4. In the construction of a will the intent of the testator should be gathered if possible from the entire instrument. *Granger* v. *Duryea*, 616.

5. Where a will provided that, after the death of certain of testatrix's children and the execution of a special trust to a son, all of the remainder of her estate should be divided "between those of my grandchildren as shall then be living, and the issue of each of the grandchildren as shall then have died and left issue them surviving," the final distribution of the estate should be made *per capita* among the grandchildren surviving at the time designated. *Id.*

See COMPROMISE AND SETTLEMENT (2); FRAUD (8).

WITNESSES.

1. Where defendant's sworn testimony as a witness was contradictory to his answer, verified by him under oath, the court cannot but give consideration to such contradictory statements made under oath when weighing his testimony. *Meade* v. *Brown*, 556.

2. A witness may not be impeached on his answers to questions on cross-examination upon collateral matters. *People* v. *Gengels*, 632.

See APPEAL AND ERROR (7); CRIMINAL LAW (41, 42, 45); EVIDENCE (1); INSURANCE (9); NEGLIGENCE (12, 14).

WORDS AND PHRASES—See ADVERSE POSSESSION (2); CRIMINAL LAW (23); DIVORCE (1); MARRIAGE; STATUTES (2).

WORKMEN'S COMPENSATION ACT—See MASTER AND SERVANT (1-16, 21, 22, 24).

WORKMEN'S COMPENSATION ACT NOT AMENDED BY JUDICATURE ACT—See STATUTES (4).

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